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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 1055

HONORABLE W. HAROLD COX, UNITED STATES DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,

Petitioner,

VS.

THE HONORABLE ROBERT E. HAUBERG, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, AND THE HONORABLE NICHOLAS DEB. KATZENBACH, ACTING ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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THE HONORABLE ROBERT E. HAUBERG, UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, AND THE HONORABLE NICHOLAS DEB. KATZENBACH, ACTING ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on January 26, 1965.

CITATIONS TO OPINIONS BELOW

The order of the United States District Court for the Southern District of Mississippi rendered on October 22, 1964, is not reported, and is set forth in the Appendix, hereto, *infra*, p. A59. The opinion of the United States Court of Appeals for the Fifth Circuit rendered January 26, 1965, is not reported, and is set forth in the Appendix hereto, *infra*, p. A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 26, 1965 (R. 197). The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Did the United States District Court for the Southern District of Mississippi, established pursuant to Article III of the Constitution of the United States, act within its power and authority in entering its order of October 22, 1964, directing the United States Attorney, an officer of said Court, to sign indictments which a duly constituted grand jury had voted to bring and had requested him to prepare.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional provisions and statutes of the United States, the full text of which are set forth in the appendix hereto:

Art. II, Sec. 3, United States Constitution.

Art. III, United States Constitution.

The Fifth Amendment to the Constitution of the United States.

Rule 6(d)(e), Federal Rules of Criminal Procedure.

Rule 7(c), Federal Rules of Criminal Procedure.

Rule 48(a)(b), Federal Rules of Criminal Procedure.

Title 28, United States Code, Sec. 1291.

Title 28, United States Code, Sec. 1254(1).

STATEMENT OF THE CASE

On October 22, 1964, the United States District Court for the Southern District of Mississippi, while sitting in the Jackson Division adjudged the United States Attorney, Respondent, guilty of civil contempt of Court and imposed a jail sentence upon him until he purged himself of this contempt.

Prior to this citation for contempt, the grand jury impaneled for the Southern District of Mississippi had been charged on different occasions by both judges of the Southern District of Mississippi, inter alia, that the grand jury had the power and authority to investigate any crimes known to them on their own initiative and to return indictments against anyone whom they found to probably be guilty of the violation of any federal criminal law. The United States Attorney was expressly extended an opportunity to except to such charges but took no exception to them. The grand jury convened in Biloxi, Mississippi, on September 9, 1964, and was recessed by Judge Mize to reconvene in Jackson, Mississippi, on October 21, 1964, at which time Chief Judge W. Harold Cox would be the presiding judge. The grand jury had commenced hearing a matter at Biloxi, Mississippi, which was not presented

to them by the United States Attorney and he objected to such proceedings and induced the Court to persuade the grand jury to desist from the investigation then in progress until Chief Judge W. Harold Cox could decide the propriety of the investigation. The transcript of the grand jury proceedings at Biloxi, Mississippi, revealed that the grand jurors were intensely interested in this investigation and one of the grand jurors strenuously objected to not being allowed to conclude the investigation. Upon reconvening at Jackson, Mississippi, the foreman of the grand jury made known to Chief Judge W. Harold Cox, who was then presiding, that their investigation had been interrupted by objections from the Department of Justice.

The grand jurors were at this time instructed by the Court that they had the power and authority to hear any witnesses or make any investigation they desired, regardless of whether or not these matters were presented to them by the United States Attorney or by assistants, and regardless of any contrary views that these Government attorneys might have as to the matters under investigation. The United States Attorney then advised the Court that he had instructions from the Department of Justice to stay out of the grand jury room during any such proceedings. He was instructed by the Court in the presence of the grand jury that he should not interfere in any way with the grand jury and that if he were not going to assist them that he should consider staying out of the grand jury room. The United States Attorney took no exception to this charge.

Later, on October 21, 1964, the United States Attorney went to the chambers of Chief Judge W. Harold Cox and asked if the Court did not think it advisable and would be helpful for him to go into the grand jury room and explain to the grand jury the crime of perjury and to inform them as to some important court decisions on that

question. The Chief Judge agreed with his views and expressly granted him permission to go into the grand jury room at that time for this purpose. The United States Attorney and his assistant went into the grand jury room and remained there throughout the entire session of the grand jury and until it was recessed on the next day, by reason of the refusal of the United States Attorney, to prepare indictments which he was requested to do by the grand jury.

On October 22, 1964, the grand jury advised the Court of its desire to make a report to the Court. The Court thereupon convened and was informed by the foreman of the grand jury in the presence of the United States Attorney and his assistant that they had refused to prepare certain indictments which had been requested of them by the grand jury. The Court then ordered the United States Attorney to disregard any instructions that he had received from the Department of Justice and the United States Attorney General as to the preparation of these indictments and to prepare such indictments as had been requested of him by the grand jury. He was further allowed one hour within which to communicate with the Department of Justice and the then Acting Attorney General to inform them of his instructions by the Court under penalty of contempt. After such time the Court then again convened and the United States Attorney reiterated his position and read into the record the instructions he had received from the Acting Attorney General which was in effect, to disregard such order and instructions of the Court. The Court thereupon adjudged the United States Attorney guilty of civil contempt and ordered that he be incarcerated in jail until he purged himself of this contempt.

On October 23, 1964, Robert E. Hauberg, United States Attorney, and Nicholas deB. Katzenbach, Acting Attorney

General of the United States, filed a notice of appeal from the order entered by the United States District Court on October 22, 1964, adjudging the United States Attorney guilty of civil contempt and committing him for confinement and ordering the issuance of a citation to the Acting Attorney General directing him to appear and show cause why he should not be adjudged guilty of contempt. On October 23, 1964, a stay order was entered by the Court of Appeals for the Fifth Circuit pending appellate proceedings pursuant to the provisions of Title 28, U.S.C., Sec. 1291. In addition to the appeal of the United States Attorney, a petition for a writ of prohibition was filed on behalf of the Petitioners, the United States Attorney and the Acting Attorney General of the United States. Thereafter, both the Petitioners and Appellants and Respondent and Appellee filed respective designations of record, stipulation for accelerated brief schedule and hearing, answer of the respondent, W. Harold Cox, United States District Judge, counter-designation of additional portions of the record and briefs. The appeal, being cause No. 22,019 and the petition for writ of prohibition being cause No. 22,018, were consolidated for hearing by the Court of Appeals for the Fifth Circuit by an order dated October 26, 1964, and both matters heard, en banc on December 18, 1964, on oral argument.

On January 26, 1965, the Court of Appeals for the Fifth Circuit rendered its unanimous opinion dismissing the appeal of the Acting Attorney General and denying the petition for a Writ of Prohibition. Upon a four to three decision of the seven Circuit Judges participating, the Order of the United States District Court requiring the Honorable Robert E. Hauberg, United States Attorney, to prepare and sign certain indictments which he had been requested to prepare by a duly constituted grand

jury, was reversed. Three of the Circuit Judges were of the opinion that the Order of the United States District Judge requiring the United States Attorney to *prepare* and *sign* the requested indictments constituted an encroachment upon the authority of the Executive Department and could not be enforced. Three of the Circuit Judges were of the opinion that the Order of the United States District Judge was valid and could be enforced. One of the Circuit Judges was of the opinion that the Order of the District Judge was valid and enforceable insofar as it required the United States Attorney to *prepare* said indictments, but that the portion of the order requiring said United States Attorney to *sign* said indictments was unenforceable. The order being in the conjunctive requiring the United States Attorney to *prepare* and *sign* said indictments, it was the opinion of the majority that the Order of October 22, 1964, of the United States District Court to Honorable Robert E. Hauberg, United States Attorney, should be reversed.

There were four different opinions written and recorded by the United States Court of Appeals for the Fifth Circuit, see Appendix, *infra*, pages A1 to A57.

It is the judgment of the United States Court of Appeals for the Fifth Circuit reversing the Order of the United States District Court upon the appeal of Honorable Robert E. Hauberg, United States Attorney, only, which petitioner requests this Court to review.

REASONS FOR THE ALLOWANCE OF THE WRIT

As shall appear from the argument to follow, this writ should be allowed for the following reasons: (1) the Court of Appeals for the Fifth Circuit has decided in this

cause important federal jurisdictional and procedural issues which have not been, but should be, settled by this Court; (2) there exists a conflict between the decision of the Court of Appeals for the Fifth Circuit in this cause with the decisions of other Courts of Appeals involving some of the same questions herein presented; and (3) the Court of Appeals for the Fifth Circuit has in this cause rendered an opinion which is in conflict with decisions of the United States Supreme Court.

ARGUMENT

POINT 1

The Court of Appeals for the Fifth Circuit in This Cause Has Decided Important Federal Jurisdictional and Procedural Issues Which Have Not Been, But Should Be, Settled by This Court

The holding of the majority in the court below that the Attorney General of the United States has the discretionary power to prevent an indictment of a federal grand jury by directing the United States Attorney to withhold his signature wholly ignores the traditional broad inquisitorial powers of the grand jury, and limits the constitutional requirements of Amendment V to the United States Constitution to the benefit of the accused.

This conclusion of the lower court is contrary to the many cases and articles describing the history, tradition and current role, functions, powers and duties of grand juries. See *United States* v. *Smythe*, 104 F.Supp. 283-309 (N.D. Cal., 1952); *Sullivan* v. *United States*, 348 U.S. 170, 173, wherein this court stated:

> "It is elementary that a Federal grand jury has the unquestioned right and duty to inquire into any matter within the jurisdiction potentially involving viola-

> tions of law and to return an indictment if it finds a reasonable probability that a crime has been committed. This it may do at the instance of the court, the United States Attorney, the Attorney General or on its own initiative, from evidence it may gather or from knowledge of its members."

citing numerous other cases; see also Orfield, The Federal Grand Jury, 22 F.R.D. 343-463 (1958). Professor Orfield writes:

> "The grand jury serves two great functions. (Citing cases) One is to bring to trial persons accused of crime upon just grounds. The other is to protect persons against unfounded or malicious prosecutions by insuring that no criminal proceeding will be undertaken without a disinterested determination of probable guilt. The inquisitorial function has been called the more important."

The holding of the majority in the lower court is contrary to the heretofore unquestioned right of a federal grand jury to inquire into any matter within the jurisdiction involving violation of laws of the United States and to return an indictment if it finds a reasonable probability that a crime has been committed based upon evidence gathered through its own initiative and/or from knowledge of its own members, a right which has been recognized since the inception of the grand jury. *Sullivan* v. *United States, supra; Hale* v. *Henkel,* 201 U.S. 43, 50 L. Ed. 652, 26 S. Ct. 370; *United States* v. *Thompson,* 251 U.S. 407, 64 L. Ed. 333, 40 S. Ct. 289; *Blair* v. *United States,* 250 U.S. 273, 63 L. Ed. 979, 39 S. Ct. 468; and numerous other decisions.

The holding of the majority in the court below ignores the age old fact that it is the grand jury, an arm of the judiciary under the constitutional separation of powers doctrine, and not the Attorney General of the United States or the United States Attorney, as an arm of

the Executive, that has the power and responsibility of finding and returning an indictment. The Fifth Amendment to the Constitution of the United States provides "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury . . ." The fact that the responsibility of finding and returning an indictment rests solely upon the grand jurors is made clear by the provisions of *Rule 6(d), F. R. Crim. P.* ". . . No person other than the grand jurors may be present while the grand jury is deliberating or voting."

The holding of the majority that "The affixing or withholding of the signature (of the government attorney) is a matter of Executive discretion which cannot be coerced or reviewed by the courts," is in direct conflict with *Rule 7(c), F. R. Crim. P.* which provides that the indictment "shall be signed by the Attorney for the Government." It is needless to say that Rule 7(c) is the product of this court which was given the effect of statute law by an act of the Congress of the United States and was in force and effect at the time of the entry of the Order of October 22, 1964, by the United States District Court in question here.

The interpretation of the majority of the lower court of *Rule 48(a), F.R. Crim. P.* providing that ". . . the Attorney General or the United States Attorney may by *leave of Court* file a dismissal . . ." wherein doubt is expressed as to the constitutionality of said Rule unless a discretionary power of the United States Attorney to prevent an indictment by withholding a signature of the government attorney is contrary to the clear intent and meaning of said Rule as adopted by this Court and made law by the Congress of the United States. According to the history of the Rule and the ordinary meaning of the language used therein,

it was primarily intended to authorize the court to protect defendants and not to confer prosecutive functions upon the court, *United States* v. *Greater Blouse, Skirt & Neckwear Contractors Assn.*, S.D. N.Y. 1964, 228 F.Supp. 483, 489-490.

Petitioner submits that the holdings of the majority in the lower court as above outlined, if permitted to stand, will greatly jeopardize the proper administration of criminal laws and criminal justice.

We invite the Court's attention to a few of the numerous cases wherein this court has granted certiorari in cases involving important federal jurisdictional and procedural issues affecting the power and functions of the federal judiciary, the administration of criminal justice and the construction of the Federal Rules of Criminal Procedure:

Pollard v. *U. S.*, 352 U.S. 354, 1 L. Ed. 2d 393, 77 S. Ct. 481;

McNabb v. *U. S.*, 318 U.S. 332, 341, 87 L. Ed. 819, 63 S. Ct. 608, reh. den. 319 U.S. 784, 87 L. Ed. 1727, 63 S. Ct. 1322;

Green v. *U. S.*, 356 U.S. 165, 2 L. Ed. 2d 672, 78 S. Ct. 632;

Mallory v. *U. S.*, 354 U.S. 449, 1 L. Ed. 2d 1479, 77 S. Ct. 1356;

Carroll v. *U. S.*, 354 U.S. 394, 1 L. Ed. 2d 1442, 77 S. Ct. 1332;

Heflin v. *U. S.*, 358 U.S. 415, 3 L. Ed. 2d 407, 79 S. Ct. 451;

Pittsburgh Plate Glass Co. v. *U. S.*, 360 U.S. 395, 3 L. Ed. 2d 1323, 79 S. Ct. 1237;

Rosenberg v. *U. S.*, 360 U.S. 367, 3 L. Ed. 2d 1304, 79 S. Ct. 1231;

Fung Foo v. *U. S.*, 369 U.S. 141, 7 L. Ed. 2d 629, 82 S. Ct. 671.

POINT 2

There Is a Conflict in the Decision of the Court of Appeals for the Fifth Circuit in This Cause with Decisions of Other United States Courts of Appeals Involving Some of the Same Questions Here Presented

The holding of the majority in the court below that "if the attorney refuses to sign, as he has the discretionary power of doing, we conclude that there is no valid indictment", and "(I)t is not to be supposed that the signature of counsel (the government attorney) is merely an attestation of the act of the Grand Jury," (App. p. A7), is in direct conflict with *Wheatley* v. *United States*, 4 Cir. 1946, 159 F.2d 599, where the rule was well stated as follows by Judge Soper, Judges Parker and Dobie concurring:

> "It has been held that the signature of the prosecuting attorney is no part of the indictment and is necessary only as evidence of the authenticity of the document; and it has also been held that the improper signing of an indictment is not such a defect as would invalidate the instrument; In re Lane, 135 U.S. 443, 449, 10 S. Ct. 760, 34 L. Ed. 219; Miller v. United States, 6 Cir., 300 F. 529, 536, certiorari denied 266 U.S. 624, 45 S. Ct. 123, 69 L. Ed. 474; King v. United States, 5 Cir., 279 F. 103, 104; United States v. McAvoy, C.C.N.Y., 26 Fed. Cas. (No. 15,654) 1044, 1045."

See also *Abramson* v. *United States*, 5 Cir. 1964, 326 F.2d 565, 567; *United States* v. *Keig*, 7 Cir. 1964, 334 F.2d 823; and *Wiltsey* v. *United States*, 4 Cir. 1955, 222 F.2d 600.

We respectfully submit that the conflicts created by the split opinion of the lower court in this case with the decisions of the other Courts of Appeals above cited is ample justification for the granting of certiorari as prayed for herein.

We invite the Court's attention to the following cases, among the many, wherein this Court has granted certiorari because a Court of Appeals decision was in conflict with decisions of other Courts of Appeals:

Brunning v. *U. S.*, Cal. 1964, 376 U.S. 58, 11 L. Ed. 2d 772, 84 S. Ct. 906;

DiBella v. *U. S.*, Fla. & N.Y. 1962, 369 U.S. 121, 7 L. Ed. 2d 614, 82 S. Ct. 654;

LaBuy v. *Howes Leather Company*, 1957, 352 U.S. 249, 1 L. Ed. 2d 290, 77 S. Ct. 309, reh. den. 352 U.S. 1019, 1 L. Ed. 2d 560, 77 S. Ct. 553;

Affronti v. *U. S.*, Mo. 1955, 350 U.S. 79, 100 L. Ed. 62, 76 S. Ct. 171.

POINT 3

The Opinion of the Court of Appeals for the Fifth Circuit in This Cause Is in Conflict with Decisions of the United States Supreme Court

The holding of the majority in the court below that, "The signature of the government attorney is necessary to the validity of the indictment" and "(I)t is not to be supposed that the signature of counsel (the government attorney) is merely an attestation of the act of the Grand Jury", is in direct conflict with *Crowley* v. *The United States*, 1903, 194 U.S. 461, 475, in which this court said:

> "The *indictment* embodies charges made by grand jurors, and *the signature of the United States Attorney merely attests the actions of the grand jury*, whereas *information* rests upon the responsibility of the attorney representing the government and imports an investigation of the facts by him in his official capacity."

See also *In re Lane*, 1890, 135 U.S. 443, 449, 34 L. Ed. 219, 10 S. Ct. 760.

The holding of the majority in the court below that the United States Attorney has the discretionary power to prevent an indictment by withholding his signature is in conflict with *United States* v. *Thompson*, 251 U.S. 407, 413-415; *Blair* v. *United States*, 250 U.S. 273, 282; *Hale* v. *Henkel*, 201 U.S. 43, 61-66; *Frisbie* v. *United States*, 157 U.S. 160, 163; *Sullivan* v. *United States*, 1954, 348 U.S. 170, 173; *Ex Parte United States*, 1932, 287 U.S. 241, wherein this court has consistently held that the Executive Department acting through the Attorney General of the United States, his assistants and the United States Attorney have no authority to curtail or limit the well recognized power of the grand jury to consider, investigate and make inquiry into any matter within the jurisdiction involving violation of the laws of the United States and to return an indictment into open court if it finds a reasonable probability that a crime has been committed.

Because of the conflicts created by the opinion of the lower court with the aforesaid opinions of the Supreme Court of the United States, we submit that certiorari should be granted, *U. S. Steel Workers of America, AFL-CIO* v. *N.L.R.B.*, N.Y. 1964, 376 U.S. 492, 11 L. Ed. 2d 863, 84 S. Ct. 899; *Pa. R.R. Co.* v. *O'Rourke*, N.Y. 1953, 344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302.

CONCLUSION

For the reasons above set forth, Petitioner prays that this Court grant this petition for a writ of certiorari and review the judgment of the Court of Appeals for the Fifth Circuit in this cause.

Respectfully submitted,

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APPENDIX A

The Opinion of the Court of Appeals for the Fifth Circuit upon which a Writ of Certiorari is sought.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22018

THE UNITED STATES OF AMERICA; THE HONORABLE NICHOLAS deB. KATZENBACH, Acting Attorney General of the United States; and THE HONORABLE ROBERT E. HAUBERG, United States Attorney for the Southern District of Mississippi,

Petitioners,

versus

HONORABLE W. HAROLD COX, United States District Judge of the United States District Court for the Southern District of Mississippi,

Respondent.

Petition for a Writ of Prohibition

No. 22019

THE HONORABLE ROBERT E. HAUBERG, United States Attorney for the Southern District of Mississippi; and THE HONORABLE NICHOLAS deB. KATZENBACH, Acting Attorney General of the United States,

Appellants,

versus

HONORABLE W. HAROLD COX, United States District Judge of the United States District Court for the Southern District of Mississippi,

Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

(January 26, 1965.)

Before TUTTLE, Chief Judge, and RIVES, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

JONES, Circuit Judge: On October 22, 1964, an order of the United States District Court for the Southern District of Mississippi, signed by Harold Cox, a judge of that Court, was entered. The order, with caption and formal closing omitted, is as follows:

> THE GRAND JURY, duly elected, impaneled and organized, for the Southern District of Mississippi, reconvened on order of the Court at 9:00 A.M., October 21, 1964, in Court Room Number 2 in Jackson, Mississippi, for the general dispatch of its business. The grand jury was fully instructed as to their duties, powers and responsibilities and retired to the grand jury room under 538 in the Federal Building at Jackson to do its work. The United States Attorney (and one of his assistants) sat with the grand jury throughout the day on October 21 and explained in detail to the grand jury the perjury laws and the Court's construction of such laws for their information. The grand jury heard witnesses throughout the day on October 21, 1964. On the morning of October 22, 1964, the grand jury, through its foreman, made known to the Court in open court that they had requested Robert E. Hauberg United States Attorney, to prepare certain indictments which they desired to bring against some of the persons under consideration and about which they had heard testimony, and the United States Attorney refused to draft or sign any such indictments on instructions of the Acting Attorney General of the United States; whereupon the Court ordered and directed said United States Attorney to draft such true bills or no bills as the grand jury may have duly voted and desired to report and to sign such instruments as re-

quired by law under penalty of contempt. The United States Attorney was afforded one hour within which to decide as to whether or not he would abide by the instructions and order of the Court in such respect. At the end of such time, the Court re-convened and the United States Attorney was specifically asked in open court as to whether or not he intended to conform with the order and direction of the Court in said respects whereupon the United States Attorney answered that he respectfully declined to do so on instructions from Nicholas deB. Katzenbach, Acting Attorney General. He was thereupon duly adjudged by the Court to be in civil contempt of the Court and was afforded an opportunity to make any statement which he desired to make to the Court before sentence; whereupon the United States Attorney reiterated his inability to comply with the order of the Court upon express and direct instructions from Nicholas deB. Katzenbach, Acting Attorney General of the United States.

WHEREFORE, IT IS ORDERED AND ADJUDGED by the Court that Robert E. Hauberg, United States Attorney, is guilty of civil contempt of this Court and in the presence of the Court for his said refusal to obey its said order and he is ordered into custody of the United States Marshal to be confined by him in the Hinds County, Mississippi, jail, there to remain until he purges himself of this contempt by agreeing to conform to said order by performing his official duty for the grand jury as requested in the several (about five) pending cases before them on October 21 and October 22, 1964.

IT IS FURTHER ORDERED by the Court that a citation issue to Nicholas deB. Katzenbach, Acting Attorney General of the United States, directing him to appear before this Court and show cause why he should not be adjudged guilty of contempt of this Court for his instructions and directions to the United States Attorney to disregard and disobey the orders of this Court in the respects stated.

> The United States Attorney requested a stay of enforcement of this order and further proceedings herein for five days after this date to enable him to apply to the United States Court of Appeals for the Fifth Circuit for a writ of prohibition and such request is granted; and these proceedings and enforcement of this order in its entirety is stayed for five days, subject to the further orders of the United States Court of Appeals on said application; and for the enforcement of all of which, let proper process issue.

The United States Attorney, Robert E. Hauberg, and the Acting Attorney General, Nicholas deB. Katzenbach, have appealed from the order and they, joined by the United States, seek a writ of prohibition against the District Judge from enforcing the Court's order, and from asserting jurisdiction to require the Attorney General or the United States Attorney "to institute criminal prosecutions or to take any steps in regard thereto." The facts recited in the order are uncontroverted. No further facts are essential to a decision of the issues before this Court. Although the issues here presented arose, in part at least, as an incident of a civil rights matter, no civil rights questions are involved in the rather broad inquiry which we are called upon to make.

The constitutional requirement[1] of an indictment or presentment[2] as a predicate to a prosecution for capital or infamous crimes has for its primary purpose the protection of the individual from jeopardy except on a finding of probable cause by a group of his fellow citizens, and is designed to afford a safeguard against oppressive actions of the prosecutor or a court. The constitutional provision is not to be read as conferring on or preserving to the

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1. U. S. Const. Amend. V.

2. Nothing in this case involves or requires a discussion of a presentment.

grand jury, as such, any rights or prerogatives. The constitutional provision is, as has been said, for the benefit of the accused. The constitutional provision is not to be read as precluding, as essential to the validity of an indictment, the inclusion of requisites which did not exist at common law.

Traditionally, the Attorney for the United States had the power to enter a nolle prosequi of a criminal charge at any time after indictment and before trial, and this he could have done without the approval of the court or the consent of the accused. It may be doubted whether, before the adoption of the Federal Rules of Criminal Procedure, he had any authority to prevent the return of an indictment by a grand jury. There would be no constitutional barrier to a requirement that the signature of a United States Attorney upon an indictment is essential to its validity.

It is now provided by the Federal Rules of Criminal Procedure that the Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment. Rule 43(a) Fed. Rules Crim. Proc. 18 U.S.C.A. In the absence of the Rule, leave of court would not have been required. The purpose of the Rule is to prevent harassment of a defendant by charging, dismissing and recharging without placing a defendant in jeopardy. *Woodring* v. *United States*, 8th Cir. 1963, 311 F. 2d 417. Rule 7 eliminates the necessity for the inclusion in an indictment of many of the technical and prolix averments which were required at common law, by providing that the indictment shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. The Rule also provides that "It shall be signed by the attorney for the government." Rule 7(c) Fed. Rules Crim. Proc. 18 U.S.C.A.

The judicial power of the United States is vested in the federal courts,[3] and extends to prosecutions for violations of the criminal laws of the United States. The executive power is vested in the President of the United States,[4] who is required to take care that the laws be faithfully executed.[5] The Attorney General is the hand of the President in taking care that the laws of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed.[6] The role of the grand jury is restricted to a finding as to whether or not there is probable cause to believe that an offense has been committed. The discretionary power of the attorney for the United States in determining whether a prosecution shall be commenced or maintained may well depend upon matters of policy wholly apart from any question of probable cause.[7] Although as a member of the bar, the attorney for the United States is an officer of the court, he is nevertheless an executive official of the Government, and it is as an officer of the executive department that he exercises a discretion as to whether or not there shall be a prosecution in a particular case. It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal

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3. U. S. Const. Art. III.

4. U. S. Const. Art. II, Sec. 1.

5. U. S. Const. Art. II, Sec. 3.

6. Ponzi v. Fessenden, 258 U.S. 254, 262, 42 S. Ct. 309, 66 L. Ed. 607.

7. Schwartz, Federal Criminal Jurisdiction, 13 Law & Contemp. Prob. 64; 2 Ops. Att'y Gen. 482; 38 Ops. Att'y Gen. 98.

prosecutions.[8] The provision of Rule 7, requiring the signing of the indictment by the attorney for the Government, is a recognition of the power of Government counsel to permit or not to permit the bringing of an indictment. If the attorney refuses to sign, as he has the discretionary power of doing, we conclude that there is no valid indictment. It is not to be supposed that the signature of counsel is merely an attestation of the act of the grand jury. The signature of the foreman performs that function. It is not to be supposed that the signature of counsel is a certificate that the indictment is in proper form to charge an offense. The sufficiency of the indictment may be tested before the court. Rather, we think, the requirement of the signature is for the purpose of evidencing the joinder of the attorney for the United States with the grand jury in instituting a criminal proceeding in the Court. Without the signature there can be no criminal proceeding brought upon an indictment. Substantial compliance rather than technical exactness meets the requirement of the rule. There seems to be no authority for the statement that the absence of a signature is not fatal. 4 Barron, Federal Practice & Procedure 61, § 1913.

If it were not for the discretionary power given to the United States Attorney to prevent an indictment by withholding his signature, there might be doubt as to the con-

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8. Statements of the controlling principles and references to other precedents may be found in Dean Wing Jung v. United States, 9th Cir. 1963, 312 F. 2d 73; Swepston v. United States, 8th Cir. 1961, 289 F. 2d 166, cert. den. 368 U. S. 812, 82 S. Ct. 689, 7 L. Ed. 2d 612; People v. Florio, 301 N.Y. 48, 92 N.E.2d 881, 17 A L R 2d 993; Hassan v. Magistrates Court, 191 N.Y.S. 2d 238; Murphy v. Sumners, 54 Tex. Crim. App. 369, 112 S.W. 1070.

stitutionality of the requirement of Rule 48 for leave of court for a dismissal of a pending prosecution.[9]

Because, as we conclude, the signature of the Government attorney is necessary to the validity of the indictment and the affixing or withholding of the signature is a matter of executive discretion which cannot be coerced or reviewed by the courts, the contempt order must be reversed. It seems that, since the United States Attorney cannot be required to give validity to an indictment by affixing his signature, he should not be required to indulge in an exercise of futility by the preparation of the form of an indictment which he is unwilling to vitalize with his signature. Therefore he should not be required to prepare indictments which he is unwilling and under no duty to sign.

Judges Tuttle, Jones, Brown and Wisdom join in the conclusion that the signature of the United States Attorney is essential to the validity of an indictment. Judge Brown, as appears in his separate opinion, is of the view that the United States Attorney is required, upon the request of the grand jury, to draft forms of indictments in accordance with its desires. The order before us for review is in the conjunctive; it requires the United States Attorney to prepare and sign. A majority of the court, having decided that the direction to sign is erroneous, the order on appeal will be reversed.

So much of the order of the district court as adjudges the United States Attorney for the Southern District of Mississippi to be in contempt is a final order, appealable as such, and for the reasons here assigned, is reversed. That part of the order of the district court as would re-

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9. Consideration of the constitutionality of the rule is not necessary for the disposition of the matters before us.

quire the Acting Attorney General to show cause why he should not be held in contempt is interlocutory and not appealable, and the appeal of the Acting Attorney General will be dismissed.

There remains for our consideration and disposition the petition of the United States, the Acting Attorney General and the United States, for a Writ of Prohibition to prohibit the Respondent District Judge from enforcing the order. The reversal of the order as to the United States Attorney makes unnecessary, so far as he is concerned, any consideration of the application for a Writ of Prohibition. There has been no citation issued for service on the Attorney General requiring him to show cause. He has not yet been put in jeopardy. Our disposition of the appeal makes it improbable that such citation will be issued and served. It does not appear that there is any necessity at this time for the issuance of the discretionary Writ of Prohibition. The petition will be denied.

We are of the opinion that whenever a United States Attorney is under a legal duty which he has been directed to perform by a valid order of court, his refusal to perform such duty and comply with such order will not be justified or excused by instructions from the Attorney General to disregard his duty and disobey the order. Thus the way is open for relief if a further order is entered with respect to the rendering of assistance to the grand jury by the United States Attorney in the preparation of indictments.

The respondent-appellee has challenged the right of the United States to join in the petition for a Writ of Prohibition. We find it unnecessary to pass on this question.

The Court's mandate will issue forthwith. APPEAL DISMISSED as to Katzenbach, Acting Attorney General.

ORDER ON APPEAL REVERSED as to Hauberg, United States Attorney PETITION FOR WRIT OF PROHIBITION DENIED.

RIVES, GEWIN and BELL, Circuit Judges, Concurring in part and dissenting in part:

The question presented arose pointedly when the foreman of the grand jury, in the presence of the grand jurors in open court, requested help from the court as follows:

"BY FOREMAN COWAN:

"Judge Cox, we have under consideration three different matters, *two we have concluded,* the third is in the process of being concluded. On yesterday we asked Mr. Hauberg, the United States District Attorney, to assist us in preparing true bills in the manner that we have been served here before handing us these bills. Mr. Hauberg said that he could not do so without permission being given from the Department in Washington. We concluded yesterday afternoon by asking him to secure that permission and *to have those true bills ready for us this morning.* Mr. Hauberg now tells us that he has been instructed on all three matters not so to do. In other words we are at the position now in the event that we should vote indictment why we don't know what to do with it after that may or may not be accomplished." (Emphasis added)

The court then asked the District Attorney if he wished to respond. The District Attorney stated that he had been instructed by the Acting Attorney General not to prepare the indictments. The record discloses that the grand jury had heard evidence about certain matters which the Attorney General's office had already investigated and determined did not warrant prosecution. The grand jury had also heard evidence about matters of which the Attorney General had no knowledge and had made no in-

vestigation.[1] The District Attorney disclosed to the court that the Acting Attorney General had directed him to request the FBI to investigate such matters, but that he had likewise been directed not to proceed in assisting the grand jury. In this colloquy the court stated to the District Attorney that the court considered the grand jury to be within its province in hearing the matters under consideration and in passing upon them pursuant to their oath. Accordingly, the court directed the District Attorney to disregard his instructions from the Department of

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1. "BY MR. HAUBERG: If the Court please, after the grand jury requested me to prepare proposed indictments in several matters on yesterday I contacted Mr. Burke Marshall and had a lengthy conversation with him and was to receive further instructions early this morning, but last night I was instructed that not to prepare the proposed indictments. This morning on the telephone with Mr. Katzenbach, the Acting Attorney General of the United States, and Mr. Burke Marshall both on the telephone there I was directed by Mr. Katzenbach that as to the one of the matters the Department of Justice and the United States felt as if the law and the fact was not sufficient to constitute perjury and that an indictment thereon would be no good.

"BY THE COURT: That's in connection with two witnesses for the government wasn't it that they are considering?

"BY MR. HAUBERG: Yes, Your Honor, and as to the other two matters the Department of Justice had no knowledge of the individuals involved until the Grand Jury received or started taking testimony on it starting out with Mr. Boyce Holleman back I believe on the 30th of September and the Department had not conducted or had the FBI conduct any investigation in either that matter or in the matter which subsequently came to the attention of the Grand Jury this week. I am authorized to state that the Attorney General has requested me and directed me to ask the FBI to investigate those other two matters, but that as United States Attorney I would be unable to proceed in either one of these matters, so I have now as of this morning, Your Honor, been directed by Mr. Katzenbach that as a United States Attorney or representing the United States of America that I cannot proceed in any one of these three matters, that Mr. Katzenbach, the Attorney General, has taken away my authority as such."

Justice and to serve the grand jury by preparing the true bills as had been requested. The court then recessed and requested the District Attorney to c mmunicate further with the Department of Justice and to advise that Department of the instructions of the court. After the recess, the District Attorney reported to the court that he had conferred by telephone with the Acting Attorney General who instructed him as follows:

> "I have been instructed 'As United States Attorney neither you nor any of your assistants are authorized to prepare or to sign indictments in the matters being heard on October 21 and 22 by the Grand Jury and I direct you and your assistants to refrain from doing so in your official capacity. If the Court should direct you to disregard my instructions on pain of contempt you should inform the Court that the Department will immediately apply to the Court of Appeals for a writ prohibiting such an order. You should request the Court for a stay of further proceedings pending the application and decision with respect to the writ of prohibition."

The court further inquired whether the District Attorney was refusing to obey the court's order to prepare true bills and sign the same as requested by the grand jury "in these cases presently pending and being considered by the Grand Jury." The District Attorney stated to the court as follows:

> "If the Court please, because of instructions I have received I most humbly and respectfully have to refuse to comply."

Thus the basic issue before this Court is whether the controlling discretion as to the institution of a felony prosecution rests with the Attorney General[2] or with the grand

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2. The United States Attorney has acted at the direction of the Attorney General, and the record does not disclose his independent views.

jury. The majority opinion would ignore the broad inquisitorial powers of the grand jury, and limit the constitutional requirement of Amendment V to the benefit of the accused.[3]

We agree with Professor Orfield that:

> "The grand jury serves two great functions.[360] One is to bring to trial persons accused of crime upon just grounds. The other is to protect persons against unfounded or malicious prosecutions by insuring that no criminal proceeding will be undertaken without a disinterested determination of probable guilt. The inquisitorial function has been called the more important.[361]
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> "[360]In re Charge to Grand Jury, C.C.C.Cal. 1872, 30 Fed.Cas. pages 992, 993, No. 18,255, dissenting opinion of Harlan, J., in Hurtado v. People of State of California, 1884, 110 U.S. 516, 538, 555-556, 4 S.Ct. 111, 28 L.Ed. 232; Ex. parte Bain, 1887, 121 U.S. 1, 11, 7 S.Ct. 781, 786, 30 L.Ed. 849.
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> "[361]In re Grand Jury Proceedings, D.C.E.D. Pa. 1933, 4 F.Supp. 283, 284."

Orfield, *The Federal Grand Jury,* 22 F.R.D. 343, 394.

In the case last cited by Professor Orfield, Judge Kilpatrick said:

> "The inquisitorial power of the grand jury is the most valuable function which it possesses today and, far more than any supposed protection which it gives to the accused, justifies its survival as an institution.

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3. According to the majority, "The constitutional provision is not to be read as conferring on or preserving to the grand jury, as such, any rights or prerogatives. The constitutional provision is, as has been said, for the benefit of the accused. The constitutional provision is not to be read as precluding, as essential to the validity of an indictment, the inclusion of requisites which did not exist at common law."

> As an engine of discovery against organized and far-reaching crime, it has no counterpart. Policy emphatically forbids that there should be any curtailment of it except in the clearest cases."

In re Grand Jury Proceedings, D.C.E.D. Pa. 1933, 4 F.Supp. 283, 284.

The grand jury possesses plenary and independent inquisitorial powers. The Supreme Court has held that an Executive Order and a Circular Letter of the Department of Justice requiring approval of the Attorney General before any evidence could be presented in certain cases "was not intended to curtail or limit the well-recognized power of the grand jury to consider and investigate any alleged crime within its jurisdiction. See *United States* v. *Thompson*, 251 U.S. 407, 413-415; *Blair* v. *United States*, 250 U.S. 273, 282; *Hale* v. *Henkel*, 201 U.S. 43, 61-66; *Frisbie* v. *United States*, 157 U.S. 160, 163." *Sullivan* v. *United States*, 1954, 348 U.S. 170, 173.

A federal grand jury has the unquestioned right to inquire into any matter within the jurisdiction involving violations of law and to return an indictment if it finds a reasonable probability that a crime has been committed. This it may do at the instance of the court, the District Attorney, the Attorney General or on its own initiative, from evidence it may gather or from knowledge of its members.[4]

The majority holds that: "The provision of Rule 7, requiring the signing of the indictment by the attorney for

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4. Hale v. Henkel, 1906, 201 U.S. 43; United States v. Thompson, 1920, 251 U.S. 407; Blair v. United States, 1919, 250 U.S. 273; Frisbie v. United States, 1895, 157 U.S. 160; United States v. Philadelphia & R.Ry. Co., E.D. Pa. 1915, 225 Fed. 301; United States v. Smythe, N.D. Cal. 1952, 104 F.Supp. 283; Re Miller (DC Pa) F.Cas. No. 9552; and see Re Charge to Grand Jury (CC W.Va.) F.Cas. No. 18248.

the Government, is a recognition of the power of Government counsel to permit or not to permit the bringing of an indictment."

With deference we call attention that no authority is cited in support of that holding and we submit that it ignores the history of the grand jury and of the Rules of Criminal Procedure. Professor Orfield, himself a member of the Advisory Committee on Rules of Criminal Procedure, has preserved for us the history of Rule 6, captioned "The Grand Jury." See 22 F.R.D. 346-357. There is nothing in that history, nor in the succeeding Rule 7, which would authorize Government counsel to so radically reduce the powers of the grand jury. To the contrary, Professor Orfield points out that before the federal criminal rules, "It was the practice of the United States Attorney or his assistant to sign the indictment and for the foreman to sign below the endorsement 'A True Bill' on the face of it." 22 F.R.D. 377, 378. Rule 7 simply continued the already existing practice. Professor Orfield further states,

> "When the United States Attorney does sign, this 'merely attests the action of the grand jury.'[357]
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> "[357]Crowley v. United States, 1904, 194 U.S. 461, 475, 24 S.Ct. 731, 737, 48 L.Ed. 1075."

22 F.R.D. at 394. In the case cited by Professor Orfield, *Crowley* v. *United States*, 1903, 194 U.S. 461, 475, the Supreme Court said:

> "The *indictment* embodies charges made by grand jurors, and *the signature of the United States Attorney merely attests the action of the grand jury,* whereas an *information* rests upon the responsibility of the attorney representing the Government, and imports an investigation of the facts by him in his official capacity." (Emphasis added.)

The finding and return of the indictment are the acts of the grand jury. When a United States Attorney prepares and signs an indictment, he does not adopt, approve, or vouch for the charge, nor does *he* institute a criminal prosecution.[5]

The United States Attorney cannot, except in an advisory capacity, inquire into the merits of whether indictments should be found and returned in particular cases being considered by the grand jury. Only the grand jurors themselves have that power. It would be grossly wrong for it to be usurped. Moreover, that is practically impossible, because "no person other than the grand jurors may be present while the grand jury is deliberating or voting." Rule 6(d), F.R. Crim. P. The responsibility of finding and returning an indictment rests solely upon the grand jurors.

The majority holds, "If the attorney [that is the attorney for the Government] refuses to sign, as he has the discretionary power of doing, we conclude there is no valid indictment." The only authority cited for that holding is 4 Barron, Federal Practice & Procedure 61, § 1913, which, in turn, cites *Wheatley* v. *United States,* 4 Cir. 1946, 159 F.2d 599, where the rule was well stated as follows by Judge Soper, Judges Parker and Dobie concurring:

> "It has been held that the signature of the prosecuting attorney is no part of the indictment and is necessary only as evidence of the authenticity of the document; and it has also been held that the improper signing of an indictment is not such a defect as would invalidate the instrument; In re Lane, 135 U.S. 443, 449, 10 S.Ct. 760, 34 L.Ed. 219; Miller v. United States, 6 Cir., 300 F. 529, 536, certiorari denied, 266 U.S. 624, 45 S.Ct. 123,

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5. That is true also as to the foreman who is under a duty to "sign *all* indictments," including those for which he does not vote. See Rule 6(c). (Emphasis added.)

69 L.Ed. 474; King v. United States, 5 Cir., 279 F. 103, 104; United States v. McAvoy, C.C.N.Y., 26 Fed.Cas. (No. 15,654) 1044, 1045."

We submit that the rule is well settled that the absence of the signature of the United States Attorney from an indictment does not invalidate a conviction based on it.[6]

Rule 7(c), F.R. Crim. P., provides that the indictment "shall be signed by the attorney for the government."[7] Rule 6(c) requires that the foreman of the grand jury also "shall sign all indictments."[8] An indictment may be found upon the concurrence of twelve or more jurors. It must be returned by the grand jury to a judge in open court. Such return is not adequate authentication. Rule 6(f). Professor Orfield states that, "Indorsement is desirable as sometimes grand juries return indictments which they have not found." Orfield, "The Federal Grand Jury," 22 F.R.D. 343, 347. The signature of the United States Attorney is a mere authentication that the indictment is the act of the grand jury.

It is not for us to pass upon the wisdom of requiring such authentication. It is enough that the law provides for the indictment to be authenticated by the signature of the attorney for the government. The United States Attorney is an officer of the court, and may be required to perform this purely ministerial act. There are few legal

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6. In re Lane, 1890, 135 U.S. 443, 449; Abramson v. United States, 5 Cir. 1964, 326 F.2d 565, 567; United States v. Keig, 7 Cir. 1964, 334 F.2d 823; Wiltsey v. United States, 4 Cir. 1955, 222 F.2d 600; Wheatley v. United States, 4 Cir. 1946, 159 F.2d 599; King v. United States, 5 Cir. 1922, 279 Fed. 103.

7. "Attorney for the government" is defined in Rule 54(c), F.R. Crim. P.

8. The forms attached to Rule 58 provide for the signatures of both the foreman and the United States Attorney.

documents which bear more awful import and potential effect upon liberty and life than does an indictment. The importance of an indictment makes rational the triple authentication which the rules have seen fit to require; viz., that it be signed both by the attorney for the government and by the foreman, and that it be returned by the grand jury to a judge in open court. All doubt will thus be removed as to whether the indictment is really the act of the grand jury.

The Attorney General himself takes the position that the grand jury has the power to return a valid indictment without the signature of the District Attorney, but contends that such an indictment does not require the defendant charged therein to answer or plead to it, or to appear and give bond. Such an indictment, according to the Attorney General's contentions, is innocuous so far as the defendant is concerned, unless and until the District Attorney or one of his assistants signs. In the meantime it is conceded that such an indictment would lie in court inactive and ineffective. Statutes of limitations would not be tolled by the return of such an indictment according to the Attorney General. He asserts that only the signature of the District Attorney (or his authorized assistants) gives the indictment life. Such argument is used to support the position that the action of the Department of Justice or the District Attorney in refusing to prepare or sign the indictment in no way impairs, impedes or influences the action of the grand jury. The Attorney General suggests that the grand jury can obtain assistance to a degree from the judge, and that some "outside person" may assist the grand jury in preparing the indictment, but that such "outside person" has no authority to sign the indictment and no authority to enter the grand jury room. In our view, the position of the Attorney General is untenable. We subscribe fully to the following as-

sertion from the exhaustive and scholarly opinion of Judge Fee in *United States* v. *Smyth,* subsequently cited with approval by the Supreme Court in *Sullivan* v. *United States, supra.*

> "The grand jury is similar to the trial jury who may convict notwithstanding positive instructions to acquit and who may pardon notwithstanding a direction to find guilty. Unquestionably, the grand jury are under no necessity to follow the orders of the prosecutor. They can present an indictment whether he will or not."[9] (104 F. Supp. 283, 294.)

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9. In support of the quoted conclusion, Judge Fee quotes the following in footnote 44 from the Manual for Grand Jurors, prepared by the Federal Grand Jurors Association for the Eastern District of New York, Congressional Record, February 21, 1952, A1115:

> " '8. What is the place of the United States Attorney (or his assistant) in the functioning of the grand jury? You must naturally accord him the respect due an officer of the government, sworn to protect and enforce its laws; you must realize that usually he is an intelligent, experienced individual acting in all sincerity. But do not forget that he is, from the viewpoint of the grand jury, only a lawyer, an agent of the Federal Department of Justice and by law he is only the legal advisor to the grand jury. This does not make him infallible in his opinions, although his experience and position require respectful attention of the jurors. Should a dispute arise between him and the grand jury, recourse should be had to the federal judge who administered the oath to you.' The grand jury has the power and duty: '7. To insist at all times on the independence of the grand jury from pressures of any sort, whether these stem from the prosecuting official or the court * * *.' "

Judge Fee makes the following additional assertions in his opinion as to the power of grand jurors:

". . . . As such, with its essential elements of plenary power to investigate and secrecy of its deliberations, it was preserved by the Constitution of the United States not only to protect the defendant but to permit public spirited citizens, chosen by democratic procedures, to attack corrupt conditions. A criticism of the action of the grand jury is a criticism of democracy itself." (Opinion p. 288.)

". . . . But the grand jurors, by use of secrecy of their proceedings, stubbornly retained the power of instituting an in-

The Attorney General insists that the prosecution of offenses against the United States is an executive function of the Attorney General deraigned from the executive power vested in the President to "take care that the laws be faithfully executed." U.S. Const. art. II, §3. The short answer is that one of the most fundamental and important of the laws so to be faithfully executed is the clear and explicit provision of the Fifth Amendment to the Constitution that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury. . . ."

The Fifth Amendment adopted the grand jury as it had then been developed in England over the course of many centuries, and made it a part of the fundamental law of the United States for the institution of prosecutions for crime.[10] Thus the grand jury originated long before the doctrine of separation of powers was made the constitutional basis of our frame of government. The same Constitution which separated the three powers of government adopted the institution of the grand jury. It follows that no nice distinction need be drawn as to whether the grand jury may perform some function of the executive department. As well said by the Seventh Circuit:

> vestigation of their own knowledge or taking a rumor or suspicion and expanding it through witnesses. As we shall see, this comprehensive power also remains at this hour. The Constitution of the United States preserved the grand jury with all its powers and inherent character . . . . No other instrument can cope with organized crime which cuts across state lines, conspiracies to overthrow the government of the United States, or alleged deviations from rectitude by those who have been entrusted by the government with public trust. Even the most virulent critics are unanimously in accord that the grand juries must be preserved in the federal system for these purposes." (Opinion pp. 290-91.)

10. See Costello v. United States, 1956, 350 U.S. 359, at 361; Ex parte Bain, 1887, 121 U.S. 1, 10, 11; In re April 1956 Term Grand Jury, 7 Cir. 1956, 239 F.2d 263, 268, 269.

> "While the grand jury is, in a sense, a part of our court system, when exercising its traditional functions it possesses an independence which is unique. Its authority is derived from none of the three basic divisions of our government, but rather directly from the people themselves."

In re April 1956 Term Grand Jury, 1956, 239 F.2d 263, 269.

Moreover, in point of law and reality, the plenary inquisitorial power of the grand jury does not impinge in the slightest upon the executive function of the Attorney General to prosecute or not to prosecute offenses against the United States, for as soon as the indictment is returned, "The Attorney General or the United States Attorney may by leave of court file a dismissal . . . ." Rule 48(a), F.R. Crim. P. The majority expresses the view that their holding of a discretionary power of the United States Attorney to prevent an indictment is needed to remove some doubt as to the constitutionality of the requirement of Rule 48 for leave of court for a dismissal of a pending prosecution. We do not agree that any such doubt exists. Rule 48(a) was primarily intended to authorize the court to protect defendants and not to confer prosecutive functions upon the court. Judge Weinfield in *United States* v. *Greater Blouse, Skirt & Neckwear Contractors Ass'n*, S.D.N.Y. 1964, 228 F. Supp. 483, 489-490, well described the situation which might arise after indictment where the Attorney General or the United States Attorney does not wish to prosecute and where the district court denies dismissal:

> "The Attorney General is the head of the Department of Justice, a part of the Executive branch of the Government. Even were leave of Court to the dismissal of the indictment denied, the Attorney General would still have the right to adhere to the Department's view that the indictment cannot be supported by proof upon a trial of the merits, and accordingly, in the exer-

> cise of his discretion, decline to move the case for trial. The Court in that circumstance would be without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine. And if the indictment continues to remain in status quo, each defendant would be in a position to move for dismissal of the indictment under Rule 48(b)."

The grand jury may be permitted to function in its traditional sphere, while at the same time enforcing the separation of powers doctrine as between the executive and judicial branches of the government. This can best be done, indeed, it is mandatory, by requiring the United States Attorney to assist the grand jury in preparing indictments which they wish to consider or return, and by requiring the United States Attorney to sign any indictment that is to be returned. Then, once the indictment is returned, the Attorney General or the United States Attorney can refuse to go forward. That refusal will, of course, be in open court and not in the secret confines of the grand jury room. To permit the district court to compel the United States Attorney to proceed beyond this point would invest prosecutorial power in the judiciary, power which under the Constitution is reserved to the executive branch of the government. It may be that the court, in the interest of justice, may require a showing of good faith, and a statement of some rational basis for dismissal. In the unlikely event of bad faith or irrational action, not here present, it may be that the court could appoint counsel to prosecute the case. In brief, the court may have the same inherent power to administer justice to the government as it does to the defendant. That question is not now before us and may never arise. Except for a very limited discretion, however, the court's power to withhold leave to dismiss an indictment is solely for the protection of the defendant.

The United States Attorney is under an affirmative and mandatory duty to lend his assistance to a grand jury in making effective its decision to institute a criminal prosecution. When the grand jury insists on finding and returning an indictment, the Attorney General must acquiesce, even though its action may be contrary to the advice of the United States Attorney. The further prosecution of the case is another matter.

We agree that proper enforcement of the law does not require that indictments should be returned in every case where probable cause exists. Public policy may in some instances require that a case not be prosecuted. Such consideration of public policy may be submitted to and acted on by the grand jury. As well said by Colonel E. R. Mattoon in an article entitled "The Lawyer as a Social Force," 15 Ala. Law. 55, 64 (1954): ". . . the jury system calls on the lawyer to have faith in the common man—that the average citizen can be relied on, when given an adequate explanation, to understand a problem, apply reason to it, and arrive at a wise solution. This faith in the common man to solve his problems by his own reason is of the essence of a democracy." In the few cases in which the United States Attorney is unable to persuade the grand jury and the Attorney General disagrees with its action, his recourse is not to prevent the grand jury from finding and returning an effective indictment, but to file a dismissal of the indictment under Rule 48(a), F.R. Crim. P.[11]

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11. Under the Attorney General's theory as to separation of powers, it is logical to argue that the Attorney General or the United States Attorney has the power to prevent a bench warrant from issuing on an indictment even though it has been held that the court itself has no such power. Ex parte United States, 1932, 287 U.S. 241. Such a result is, however, somewhat anomalous or at least startling.

For the Attorney General to prevent the grand jury from returning an indictment would, in effect, be to confine the grand jury to returning a mere presentment. That derogates from the grand jury its alternative power to return either "a presentment or indictment." U.S. Const. amend. V. The power of the grand jury cannot be limited in any case to a presentment; it may return an indictment.

Looking beyond the present controversy, one can foresee the grave danger inherent in such a restriction of the powers of a grand jury. If a grand jury is prevented from returning an indictment no more effective than a presentment, the statute of limitations may permanently bar prosecution for the crime. When the presentment is made public, the accused may flee or witnesses may get beyond the jurisdiction of the court. For all practical purposes, the case could be dead and there would be no point in any future Attorney General causing the presentment to be followed by an indictment. Worse still, this could be accomplished in the shadows of secrecy, with the Attorney General not being required to disclose his reasons. How much better is the constitutional system by which the grand jury can find and return an effective indictment upon which a prosecution for crime is instituted. At that point the power of the grand jury ceases. It is effectively checked and overbalanced by the power of the Attorney General, recognized in Rule 48(a), to move for a dismissal of the indictment. The court may then require such a motion to be heard in open court. Instead of a prevention in the shadows of secrecy, there would be a dismissal in a formal, public judicial proceeding. ¶We do not believe that the Acting Attorney General has the authority to instruct a District Attorney to refuse to serve a grand jury when help is requested directly by the grand jury and when he is ordered by the presiding trial judge to give such service and assistance.

That question arose in *United States* v. *Smyth, supra*, where there appeared to be a conflict between an assistant district attorney and his superiors. The court concluded:

> ". . . So, when the grand jury is impaneled, an Assistant United States Attorney goes into the grand jury room. So far as the grand jury and the public are concerned, he is the United States Attorney. All accept him as such. He need not wear a uniform. He need not present to the grand jury authorization signed by the United States Attorney. He is an officer duly designated and acting by virtue of his appointment. He has power to be present at any session of the grand jury and may talk to them freely inside or outside the grand jury room, except when the grand jury is deliberating or voting. *His authority is not destroyed by any order of the United States Attorney that someone else conduct the proceedings or by any controversy in the office of the United States Attorney.*" (Emphasis added.) (104 F. Supp. 306.)

In brief and in oral argument the Acting Attorney General states that ethical or moral considerations support his refusal to permit assistance to the grand jury or to permit the signing of the indictment by a government attorney. He relies on Rule 11, F.R. Civ. P. and Rule 7(c), F.R. Crim. P.[12] We disagree. It is true that an indictment may properly be described as a type of pleading in a criminal case, but it constitutes the action of the grand jury and not the Attorney General. No one could logically contend that the Attorney General or the District Attorney was preferring the charges, because neither of

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12. See Rule 7(c), F.R. Crim. P. Rule 11 provides:

"The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. * * * For a wilful violation of these rules an attorney may be subjected to appropriate disciplinary action."

them is permitted to remain in the grand jury room during deliberations or when the grand jurors vote a true bill or refuse to indict.[13] It is well for the Attorney General to investigate, but conclusions reached by him as to facts are not binding on the grand jury. Grand jurors are unlimited in their inquisitorial powers. Their source of information is not limited to facts disclosed by investigative agencies or to information furnished by the Attorney General or the District Attorney.[14] It is often true that lawyers and judges alike disagree with the actions of petit juries and grand juries. Corrective legal action may be taken, but neither the grand jury nor the petit jury can be compelled to follow the course of action desired by either the court or the Justice Department. The short answer to all of these contentions is the fact that Rule 11, F.R. Civ. P. does not apply to an indictment. On the other hand, Rule 7(c), F.R. Crim. P. positively requires the signature of the District Attorney.

By way of precaution, let us state that nothing here said is intended to reflect upon the present Acting Attorney General, in whose integrity we have the utmost confidence. Memory goes back, however, to days when we had an Attorney General suspected of being corrupt.

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13. The rule may be different as to significance of the District Attorney's signature on an information. That question is not before us.

14. The following statement of the rule was approved in United States v. Thompson, 1920, 251 U.S. 407, 64 L.ed. 333:

> "That the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous, and is therefore not exhausted or limited by adverse action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury."

There is no assurance that that will never again happen. We are establishing a precedent for other cases; we are construing a Constitution; we should retain intact that great constitutional bulwark, the institution of the grand jury.

On the cases before the Court, we agree with Judge Brown that the United States Attorney is required, upon the request of the grand jury, to draft forms of indictment in accordance with its desires. There is thus a majority of the Court in favor of that holding. We go further, and think that the United States Attorney is required to sign any indictment that may be found by the grand jury. We concur with the majority as to the dismissal of the appeal of the Acting Attorney General and as to the denial of the petition for writ of prohibition. We would, however, affirm the judgment of civil contempt against the United States Attorney.

We therefore concur in part and dissent in part.

BROWN, Circuit Judge, concurring specially:

Mine is a middle course. I agree with the opinion written by Judge Jones that the District Attorney may not be compelled to sign the formal indictment which the Grand Jury has voted to return. I concur also that F.R. Crim. P. 48(a) vests the unfettered discretion in the District Attorney to determine whether a prosecution is to be maintained or dismissed. The trial Court's range of action is confined to the protection of the rights of the defendant, F.R. Crim. P. 48(b). But I do not agree that the District Attorney may ignore the efforts of the Grand Jury to the point of declining to prepare in proper legal form the indictment they have voted to return. On the contrary, I am of the view that the Court may properly compel the District Attorney to act as legal scrivener to

the Grand Jury. The Court may, therefore, order the District Attorney to prepare the indictment in legal form. Since the joint Rives-Gewin-Bell opinion would empower the Court to compel signing of the indictment—a thing which necessarily encompasses preparation of the writing —I align myself with them to the extent of ordering the District Attorney to prepare the indictment.

Before discussing this limited duty, I have these comments in furtherance of the Court's holding that the prosecutor may not be compelled to sign the indictment—the necessary last step to an indictment's vitality.

Responsibility for determining whether a prosecution is to be commenced or maintained must be clearly fixed. The power not to initiate is indeed awesome. But it has to reside somewhere. And the more clearly pinpointed it is, the more the public interest is served through the focus of relentless publicity upon that decision. It may not, with safety, be left to a body whose great virtue is the combination of anonymity, transitory authority, and political unresponsibility.

All must be aware now that there are times when the interests of the nation require that a prosecution be foregone. These instances will most often be in the area of state secrets and national security. With stakes so high, the safety of our country, and hence the security of the world, ought not to be imperiled by leaving the important decision to a body having no definitive political responsibility. And it is hardly realistic to suggest, as do the dissenters, that these factors may be evaluated by the Grand Jury. What will be the source of their information? How extensive will it be? How close will a Grand Jury session approach a presidential cabinet meeting? How will essential government secrets be kept when dis-

closed to persons none of whom as Grand Jurors will have been subjected to customary security clearance checks?

And even in less sensitive areas, the practical operation of the prosecutorial function makes imperative the need for executive determination. The familiar example is the deliberate choice between those to be prosecuted and those who, often equally guilty, are named as co-conspirators but not as defendants, or others not named who are used as star government witnesses. And in other situations, of which the instant case may well be typical,[1] the executive's purpose to effectuate specific policies thought to be of major importance would be frustrated or encumbered were a Grand Jury given the sole prerogative of determining when a prosecution is to be effectively commenced.

Putting to one side these factors which bear on the delicate nature of governmental decisions, there are technical reasons indigenous to criminal law which are equally compelling. Federal crimes are more and more for violation of highly complex statutes. Federal jurisdiction, indeed, whether the activity constitutes a federal crime, depend on intricate facts, many beyond the knowledge and experience of laymen composing the Grand Jury.[2] The aim of the Grand Jury indictment as the means of protecting the citizen against the initiation of unfounded

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1. Use of the "law" is a common weapon against members of a class seeking to achieve civil rights. Such action is now specifically prohibited by the Civil Rights Act of 1964. See, e.g., §203(c), 42 USCA §2000a-2(1964).

2. See, as examples, prosecution for violation of the Pure Food & Drug Act, Van Liew v. United States, 5 Cir., 1963, 321 F.2d 664, and 321 F.2d 674; and for failure to file SEC registration statements for the sale of oil leases subsequently construed to be investment contracts, Roe & Stratoray Oil, Inc. v. United States, 5 Cir., 1961, 287 F.2d 435, and 1963, 316 F.2d 617.

charges is hardly advanced by a rule that permits the Grand Jury on its own to initiate the prosecution when the conscientious District Attorney knows to a legal certainty that a federal crime cannot be established.

Finally, it seems to me incongruous to assert, as do the dissenters, that the signing of the indictment is a ministerial act having no function other than one of authentication. I am, of course, aware that language of such import has been employed in some of the cases.[3] I do not see why an indictment formally signed by the foreman and reported in a solemn open court proceeding as the act of the Grand Jury needs "authentication". And I am at a complete loss to understand how the District Attorney—excluded as he is from the Grand Jury while it is voting, F.R. Crim. P. 6(d)—can "authenticate" from hearsay, or why his imprimatur is any better or different than that which would come from other Grand Jurors, each of whom can be polled by the Judge, not as to his vote, but whether a majority did vote to return the true bill.[4]

The fact is that the signature of the District Attorney has much more awesome consequence. Without a doubt that signature, together with that of the Grand Jury's foreman, is a formal, effective initiation of a prosecution. What it might be in the absence of the District Attorney's signature, we need not determine. With it, the whole prosecution has been started. And what was previously

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3. See note 6 of the Rives-Gewin-Bell opinion. Interestingly enough, in all but one the indictment was actually signed, though signed by the Assistant District Attorney, not the District Attorney himself. In the other the signature was typed. No case has yet held that an indictment which the District Attorney deliberately refuses to sign has any vitality.

4. In the instant case signature or other action of the District Attorney was not needed to establish what the Grand Jury desired to do.

an unfettered discretionary right on the part of the executive not to initiate prosecution has now been set in motion and can be stopped only on the executive taking affirmative action[5] for dismissal with all of the uncertainties which F.P Crim. P. 48(a) generates.[6]

But while I am firm that signature is a vital and significant act which reflects the exercise of an executive discretion to initiate prosecution—a thing here lacking—I am equally positive that the District Attorney has the duty to prepare the indictment when requested to do so by the Grand Jury. If this lacks logical consistency, I can only urge that an institution as old as the Grand Jury,

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5. The humor of the incident as reported by the Supreme Court of California does not conceal this great historical truth:

> "An incident related in 2 Campbell's Lives of the Chancellors 173 is of interest in this connection. After Lord Holt had ordered the imprisonment of a group of fanatics called 'Prophets' for seditious language, he was visited by Lacy, one of their friends, who informed a servant that he carried a message 'from the Lord God.' Lacy was admitted and told Lord Holt: 'I come to you a prophet from the Lord God, who has sent me to thee, and would have thee grant a nolle prosequi for John Atkins, his servant, whom thou has cast into prison.' Lord Holt replied: 'Thou art a false prophet, and a lying knave. If the Lord God had sent thee it would have been to the Attorney-General, for he knows that it belongeth not to the Chief Justice to grant a nolle prosequi; but I, as Chief Justice, can grant a warrant to commit thee to bear him company.' "

People v. Sidener, 1962, 25 Cal. Rptr. 697, 698, n. 4, 375 P.2d 641, 642.

6. The Court seems to be in virtual agreement that this rule is for the protection of the defendant alone. But the fact is we have not yet so held in a case directly presenting the question and in any event, viewed from the standpoint of the parties here, neither the District Attorney nor the Attorney General were required to assume that Rule 48(a) might not ultimately be construed as reserving considerable power to the District Judge himself in determining whether to enter a dismissal on the Government's motion. Actually, of course, the dissenters' concurrence on this is carefully hedged.

implanted in the structure as idealistic as the Constitution, is one born, not out of logic, but out of the needs of history's rich experience.

Whether a Grand Jury is, or is not, an agency outside of or beyond the traditional three powers, it certainly exists. It exists as a distinct institution with important functions. It operates as an established agency in connection with the Federal Judiciary. It is customarily charged with the important duty—as it was here specifically—to look into all crimes against the Federal Government.

Since it is charged with the duty of ascertaining whether, in the opinion of the Grand Jury, there is probable cause for believing that federal crimes have been committed, it has not only the right but the imperative duty to make a report of its conclusions to the tribunal giving it those instructions. As it is an instrument of the law, it is entitled to make its official report in a mode and terminology befitting that atmosphere. Broadly stated, it may report in one of three ways. It may formally report a no bill. It may return a true bill indictment in customary form. Or it may return a presentment, a constitutional mode fortunately no longer practiced.

To me the thing seems this simple: the Grand Jury is charged to report. It determines what it is to report. It determines the form in which it reports. Once it determines that what it wants to report is to be in the form of a true bill indictment, it obviously needs legal help. Unless its official report is to have no more significance than a presentment—a loose and ambiguous procedure which will not constitute the initiation of a prosecution—it is essential that the indictment be drawn with great care and precision. Even with the modern and proper liberality in procedural matters, both civil and

criminal, the indictment to be valid must fairly assert each essential element of the crime.[7] It is a denial of all that the profession of law stands for to think that at this important juncture in its work, the Grand Jury can get along without a lawyer. The need is imperative. The source of help is restricted. It has neither the means nor the capability of obtaining or using outside counsel. The very nature of the Grand Jury proceedings makes it impermissible for private counsel to work with and participate in Grand Jury inquiries. And it is unrealistic to suppose that through some sort of controlled confrontations, the Grand Jury, or its emissaries, could disclose enough of the facts heard to permit the lawyer to draft the indictment without, at the same time, rending the veil of secrecy.

There are a number of reasons why it is essential that the Grand Jury's conclusions be reflected in language which is legally sufficient and in proper form.

First, and perhaps foremost, in no other way can the Grand Jury effectively carry out its obligations as charged to it by the Judge. An important historical body, it ought not to have to cast about for recognition or, seemingly frustrated as it was in this case, mill around the courtroom or its environs in a sort of hat-in-hand helplessness. Although, as the Court holds, the "indictment" thus returned would be ineffective without the signature of the District Attorney, reporting its conclusion in traditional legal form would do two things. First, it would clearly reflect the conscientious conclusion of the Grand Jury itself. And, second, it would, at the same time, sharply

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7. We have constantly fresh reminders of the substantive importance of the formal sufficiency of indictments. See, e.g., Russell v. United States, 1962, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240; Smith v. United States, 1959, 360 U.S. 1, 79 S.Ct. 991, 3 L.Ed.2d 1041.

reveal the difference of view as between the Grand Jury and the prosecuting attorney.

This leads to the second important reason. The powers of the Executive are so awesome in determining those whom it will not prosecute, that where there is a difference between the Grand Jury and the Executive, this determination and the resulting conflict of views should be revealed in open court. With great power comes great responsibility. Disclosure of this difference of view and the resulting impasse would subject this decision of the Executive to the scrutiny of an informed electorate. The issue would be clearly drawn and the responsibility, both legally and in the public mind, plainly fixed. There would not be the sort of thing reflected in this record in which only in the loosest way could the public see what it was the Grand Jury purposed to do and what the Executive declined to help it to do.[8] And for future cases unless the Court holds (as it does by the concurrence of Judges Rives, Brown, Gewin and Bell) that the District Attorney must prepare the indictment form for the Grand Jury, even that limited disclosure would not be available. This is so because the Court (through another majority) holds that the trial Court may not compel the District Attorney to sign the indictment. There would thus be no occasion for, or any relief to be expected from, an oral report to the Court of the pending impasse.

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8. Indeed, the colloquy—some of it being quoted in the early part of Rives-Gewin-Bell opinion—between the Court and the Grand Jury, the Court and the District Attorney reflects on all hands extremely guarded statements, inquiries and responses couched in the vaguest sort of language lest there be a breach of Grand Jury secrecy or an intrusion upon the part of the Court or the District Attorney into the affairs reserved exclusively to it. Only in the contempt proceedings resulting in an order which we hold to have been unauthorized was the impasse between the Executive and the Grand Jury revealed in any detail.

By following this middle course we preserve fully the rightful independence of the Grand Jury in its inquisitorial role and the time-proved wisdom of the separation of powers which commits determination (and responsibility) to the Executive. This route avoids the dissenters' process which at one and the same time regards the act of signing of no real consequence, as being essential to "really" initiate the prosecution, but which means nothing since the Executive may immediately demand that the Court dismiss the proceedings. Unless the dissenters anticipate that the Judge on a post-indictment Rule 48(a) motion to dismiss will undertake to determine—or appear to be doing so—whether there are "good" enough grounds for the Executive's determination not to prosecute, the public disclosure, so vital to pinpointing responsibility within the ranks of the Executive, will be no greater than the open court proceedings in which the unsigned indictment is reported together with the fact of impasse.

For these reasons I concur specially in the reversal of the contempt order, the dismissal of the Acting Attorney General's appeal, and the denial of the writ of prohibition.

WISDOM, Circuit Judge, concurring specially:

Too many opinion-writers are like too many cooks. I brave this danger only because the savory aroma of the dish served up by the dissenters conceals the nature of its undesirable ingredients and its unhappy effects on the constitution.

It takes judicial craftsmanship of the highest order to write persuasively about "the traditional sphere" of the grand jury and not turn up one case holding that a court may compel a prosecutor to prepare and sign a bill of indictment requested by a grand jury—not one case in all the years between 1166 and 1965. I submit that the result reached in the dissent is the product of a misunder-

standing of the historical meaning of "presentment and indictment", a failure to give effect to the difference between the sword and the shield of the grand jury,[1] and an abstract approach that disregards the factual setting in which the issue is presented.

Nothing in the position of any of the judges in the majority "ignores" or tends to diminish the purely inquisitorial role of the federal grand jury.[2] But when that role goes beyond inquiry and report and becomes accusatorial, no aura of constitutional sanctity surrounds the grand jury. The Grand Jury's place in the Bill of Rights was earned by its shield, not by its sword.

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1. The Federal Grand Jury Handbook, p. 8, describes the functions of the Grand Jury in these words:

> "The Grand Jury is both a sword and a shield of justice—a sword because it is the terror of criminals, a shield because it is the protection of the innocent against unjust prosecution. But these important powers obviously create equally grave responsibilities to see that such powers are in no wise perverted or abused. With its almost limitless powers, a Grand Jury might, unless motivated by the highest sense of justice, find indictments not warranted by the evidence and thus become a source of oppression to our citizens."

2. The encomia addressed to the inquisitorial role of the grand jury properly apply to the traditional common law jury or a jury in those States still giving the jury a free rein in the exercise of its inquisitorial power. Federal grand juries, as distinguished from State grand juries, do not have the power of the latter to investigate public institutions or the actions of public officials, *where they have no reason to believe that a crime has been committed.* Compare United States v. Smyth, D.C.N.D.Cal. 1952, 104 F. Supp. 283 and Application of United Electrical Workers, D.C.S.D.N.Y. 1953, 111 F. Supp. 858 with State of Florida ex rel Brautigam v. Interim Report of Grand Jury, Fla. 1957, 93 So. 2d 99. Investigations by Congress and the administrative agencies lessen the need for federal juries to investigate corruption in public office. The Attorney General's tight control over local United States attorneys lessens the likelihood of a United States attorney's failing to invertigate and prosecute in the proper case.

I.

The Fifth Amendment requires the grand jury's "presentment or indictment" as a prerequisite to trial for a "capital, or otherwise infamous crime". This language provides no aid and comfort to the notion that either the grand jury or the court has the power to compel prosecution once the grand jury has exercised its accusatorial function. "In fact, confusion reigns as to just what a [federal] grand jury can do. Federal statutes are silent on the relationship which is to exist between a federal grand jury, the district court which summons it, and the United States attorney's office in the district. From 1789 to the present, Congress has made no definitive statement concerning grand jury powers."[3] There is, however, "every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor".[4]

Historians usually trace the English grand jury back to the Assize of Clarendon issued by Henry II in 1166, based not on Anglo-Saxon antecedents but on Norman-French inquests.[5] The function of the early grand juries was "to

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3. Comment, Powers of Federal Grand Juries, 4 Stan. L. Rev. 69 (1951). See also, Dression & Cohen, The Inquisitorial Function of Grand Juries, 41 Yale L. J. 687 (1932).

4. Costello v. United States, 1956, 350 U. S. 359, 362, 76 S. Ct. 406, 100 L. Ed. 397; Russell v. United States, 1962, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240.

In 1951 Senator Nixon introduced a bill (S. 2086, 82d Cong., 1st Sess.) defining the powers of the grand jury and providing for the appointment of a special counsel to assist any grand ju. desiring to investigate any criminal action on its own initiative. The bill died in the Judiciary Committee.

5. Stephen, A History of the Criminal Law of England (1883), 185-186, 252-254; 1 Holdsworth, History of English Laws (1956), 312-323; 2 Pollock and Maitland, History of English Law Before The Time of Edward I (1959), 642-647; Plucknett, History of the Common Law (1956), 111-120.

discover and present facts in answer to enquiries addressed to them by the King".[6] The primary purpose was to furnish the King with the names of those who were defamed by common repute, *fama publica*, an institution historically analogous to the *infamia*[7] in Roman law, both of which add content to the meaning of the phrase "infamous crimes" in the Fifth Amendment.[8] The "whole principle" of the early grand jury "was to get information useful to the Crown from those most likely to have it—the principle of the ancient inquisition."[9] This ordeal by trial avoided private prosecution by "appeal" and enabled the Crown to discover criminals who would have escaped prosecution by private parties, thereby providing another source of revenue from fines and forfeitures as well as improving the machinery for preserving law and order. The procedure was for the benefit of the Crown.

From its beginning until its abolition by Parliament in 1933,[10] the English common law presenting jury could act

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6. The Roman infamia was: "* * * a moral censure pronounced by a competent authority in the State on individual members of the community, as a result of certain actions which they had committed, or certain modes of life which they had pursued, this censure involving disqualification for certain rights both in public and in private law." Greenidge, Infamia (1897), 37.

8. Franklin, Infamy and Constitutional Civil Liberties, 14 Law. G. Rev. 1 (1954); Franklin, Roman Law and The Constitution, 38 Tul. L. Rev. 621, 623-26, 641 (1964).

9. Plucknett, supra, 126.

10. Great law reformers have criticized the grand jury as an anachronism in a modern government and as subject to abuse because of its secrecy. Most of the criticism has been directed at the grand jury's inquisitorial power. And most of the criticism came before the totalitarian movement of recent years. Jeremy Bentham, 3 Rationale of Judicial Evidence c. 15, §II ; Edward Livingston, Complete Works (1873) I-372, II-249-250; Pound & Frankfurter, Criminal Justice in Cleveland (1922) 176, 211-212,

on its own knowledge, or on the information of others, or on the Crown's written bill of indictment. *But only when this bill was preferred to the grand jury by the Crown and endorsed as a "true bill" was the accusation known as an indictment.* This was the accepted usage when the Fifth Amendment was adopted. Blackstone explained:

> "A presentment, *generally* taken, is a very comprehensive term; including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. A presentment, *properly* speaking, is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king. As, the presentment of a nuisance, a libel, and the like; upon which the officer of the court must afterwards frame an indictment, before the party presented can be put to answer it. . . . An *indictment* is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented upon oath by, a grand jury. . . . When the grand jury have heard the evidence, if they think it a groundless accusation,

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248; Wayne Morse, A Survey of the Grand Jury System, 10 Ore. L. Rev. 101, 239 (1931); Pound, Criminal Justice in America (1930) 109, 186; Moley, Politics and Criminal Prosecution (1929), 127-128; Wickersham Commission, Report on Prosecution of the National Commission on Law Observance and Enforcement (1931) 34, 125; Willoughby, Principles of Judicial Administration, (1929) 180-194. Section 113 of the A.L.I. Code of Criminal Procedure provides that all offenses heretofore required to be prosecuted by indictment may be prosecuted either by indictment or information. In 10 states the Constitution allows the legislature to modify or abolish the grand jury. Senator, then Professor, Morse found that in 1931 twenty-six states did not require indictment by the grand jury. Model Code of Criminal Procedure, Appendix 414-31. But see Dression, From Indictment to Information, 42 Yale L. J. 163 (1932); Younger, The Grand Jury Under Attack, 46 Journ. Crim. L. C. & P. S. 26, 215 (1955); Hall, Analysis of Criticism of the Grand Jury, 22 J. Crim. L. 692, 699-700 (1932).

> they used formerly to endorse on the back of the bill, *'ignoramus;'* or, we know nothing of it; intimating, that though the facts might possibly be true, that truth did not appear to them: but now, they assert in English, more absolutely, 'not a true bill;' or (which is the better way) 'not found;' and then the party is discharged without further answer. . . . If they are satisfied of the truth of the accusation, they then endorse upon it, 'a true bill,' antiently, *'billa vera.'* The indictment is then said to be found, and the party stands indicted." Blackstone's Commentaries, Vol. IV, C. XXIII, pp. 301, 302, 305. (Italics supplied by the Editor, St. George Tucker, in the First American edition, 1803).

The Fifth Amendment, therefore, does not offer a grand jury a choice between presentment or indictment. Unless there is a bill of indictment preferred to the grand jury at the instance of the Government, there can be no indictment. It is therefore entirely in the hands of the Government whether to submit an accusation to the grand jury leading to presentment in the form of an indictment and serving as the initial pleading in a criminal prosecution.

Professor Orfield finds the distinctions between indictment and presentment "confusing" as, no doubt, they are—today. His explanation of the terms is substantially similar to Blackstone's:

> "Both indictment and presentment are 'presented' to the court. Both are accusations. The presentment, however, is made by the grand jury. An indictment, on the other hand, is someone else's accusation which has been drawn up into a bill of indictment and preferred to the grand jury, who examine the evidence in support of it and then find it to be a true bill. In finding an indictment the grand jury is playing the role of a prosecutor. For that reason a presentment must be drawn up into a bill of indictment and resub-

mitted to the grand jury." Orfield, Criminal Procedure from Arrest to Appeal, 157 (1947).[11]

Professor Orfield concedes that there may be some argument that the Fifth Amendment uses the term "presentment" as an alternative for "indictment". However, he writes:

> "[I]f the term ['presentment'] is used in the Fifth Amendment with the meaning it had *when the Constitution was adopted,* it means a statement of facts by grand jurors upon which an indictment would be subsequently framed by a United States attorney, or it may mean an accusation by the grand jurors upon presentment of facts to them by a special prosecutor acting for a private individual. But it is no longer used in the federal courts because of the constant availability of a United States attorney to assist the grand jury and because of the decline of prosecution by private individuals." Ibid. 158. (Emphasis supplied).

Criminal presentment based on the grand jury's own knowledge or on knowledge furnished by others may be in disuse in federal courts, but it has not been read out of the Constitution. *Hale* v. *Henkel,* 1906, 201 U.S. 43, 62, 26 S. Ct. 370, 50 L. Ed. 652.[12] See also *Blair* v. *United States,* 1919,

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11. Similarly, Wharton states: "In its stricter meaning a presentment has been said to be an accusation by the grand jury *sua sponte,* made *ex mero motu,* whereas an indictment is a written accusation, preferred to the grand jury and presented upon oath *at the instance of the Government.*" 4 Wharton, Criminal Procedure (1957) § 1713, p. 471.

12. In Hale v. Henkel, 1906, 201 U. S. 43, Hale was called to testify before a grand jury, refused to do so, and was adjudged in contempt. He argued, in seeking release from custody on habeas corpus, that the grand jury was powerless to make any inquiry in his case since it was not acting pursuant to a particular charge. (There was no question of prosecutor's noncooperation in that case; there simply was no formal charge prior to the grand jury's investigation.) The following language of the Court carries a strong implication that the prosecutor is entitled to refuse to prepare a bill of indictment:

250 U.S. 273, 280, 39 S. Ct. 468, 63 L. Ed. 979 and *Sullivan* v. *United States*, 1954, 348 U.S. 170, 173, 75 S. Ct. 182, 99 L. Ed. 210.

Presentment is a natural corollary to the grand jury's inquisitorial power, either for an inquisition of office or for a prosecutory purpose. Its use here would not accomplish its prosecutory purpose, because the Attorney General still could decline to submit a bill of indictment to the grand jury. On the other hand, in this case a presentment in open court with an appropriate minute entry would meet many of the objections raised in the dissenting opinion and Judge Brown's opinion. Subject to the qualification that the United States Attorney is bound by his instructions from the Attorney General not to prosecute Goff and Kendrick, and therefore could not draw bills indicting them, I see no objection to his rendering other services within his ordinary duties as the legal advisor to the jury. Aborting of the criminal presentment would, in effect, convert it into the familiar inquisition of office "employed for centuries to designate the findings of a grand jury with respect to derelictions in matters of public concern, particularly of officials, which may fall short of being criminal offenses".[13] This use of presentment would be in accord with the established procedure in the common law and with the original understanding of the framers.

" 'If the grand jury . . . from the examination of witnesses, know of any offense committed in the country, for which no indictment is presented to them, it is their duty, either to inform the officer, who prosecutes for the State, of the nature of the offense, and desire that an indictment for it be laid before them; or, if they do not, or if no such indictment be given them, it is their duty to give such information of it to the court; stating, without any particular form, the facts and circumstances which constitute the offense. This is called a presentment.' "

13. In re Presentment By Camden County Grand Jur. 1952, 10 N.J. 23, 89 A. 2d 416.

I consider it preferable to the placebo the Government suggests: an indictment (which is not an indictment) to lie fallow until some day another Attorney General might or might not come along to vitalize it.

In sum, there is nothing in my view or in that of the other judges in the majority that would, as the dissenting judges assert, authorize Government counsel to "radically reduce the powers of the grand jury". The grand jury never had a plenary power to indict. It had a limited power to indict—after accusation by the Crown or the Government in the form of a bill of indictment preferred to the grand jury. The common law oath of a grand juror, as Justice Vanderbilt has pointed out, "says not a single word about indictments; on the contrary, at common law the grand jury swore to 'diligently inquire and true presentment make'. See Shaftesbury Trial, 8 St. Tr. 759."[14] The oath a federal grand juror takes today is identical with the common law oath in its avoidance of any reference to "indictment".

The decision of the majority does not affect the inquisitorial power of the grand jury. No one questions the jury's plenary power to inquire, to summon and interrogate witnesses, and to present either findings and a report or an accusation in open court by presentment.

Finally, the decision does not affect the power of the grand jury to shield suspected law violators. By refusing to indict, the grand jury has the unchallengeable power to defend the innocent from government oppression by unjust prosecution. And it has the equally unchallengeable power to shield the guilty, should the whims of the jurors or their conscious or subconscious response to community pressures induce twelve or more jurors to give sanctuary to the guilty.

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14. Ibid. 89 A. 2d at

II.

Because recognition of the grand jury's shield-like function is lodged in the Bill of Rights, the bedrock of basic rights, it is fair to say that national policy favors a liberal construction of the power of the grand jury to protect the individual against official tyranny. No such policy favors the grand jury in its accusatory role. And we should expect to find a check on its unjust accusations similar to the grand jury's check on the government's unjust accusations.

If there is one aspect of the doctrine of Separation of Powers that the Founding Fathers agreed upon, it is the principle, as Montesquieu stated it: "To prevent the abuse of power, it is necessary that by the very disposition of things, power should be a check to power".[15] Taking their institutions as they found them, the framers wove a web of checks and balances designed to prevent abuse of power, regardless of the age, origin, and character of the institution. At the same time, the framers were too sophisticated to believe that the three branches of government were absolutely separate, air-tight departments.[16] It does not matter, therefore, whether the grand jury is regarded as an arm of the court, as the Federal Grand Jury Handbook

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15. Montesquieu, The Spirit of Laws (Edinburgh, 1772) Bk. XI, C. IV.

16. Madison, for example, wrote in No. 47 of the Federalist:

"[I]t may clearly be inferred that, in saying, 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,' or, 'if the power of judging be not separated from the legislative and executive powers,' he (Montesquieu) did not mean that these departments ought to have no *partial agency* in or no *control* over, the acts of each other. His meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."

states,[17] or is regarded as a *sui generis* institution derived from the people. What does matter is that the power of the executive not to prosecute, and therefore not to take steps necessarily leading to prosecution, is the appropriate curb on a grand jury in keeping with the constitutional theory of checks and balances. Such a check is especially necessary, if there is any question of the grand jury and the district court being in agreement; if they differ, of course the district court may dismiss the grand jury. The need is rendered more acute if there is a possibility that community hostility against the suspected offenders, individually or as a race, may jeopardize justice before the petit jury. In short, if we give the same meaning to "presentment or indictment" that Madison and others gave to these terms when the Bill of Rights was introduced in the First Congress, the grand jury provision in the Bill of Rights cuts both ways: It prevents harassment and intimidation and oppression through unjust prosecution—by the Grand Jury or by the Government.

III.

The prosecution of offenses against the United States is an executive function within the exclusive prerogative of the Attorney General. "There shall be at the seat of government an executive department to be known as the Department of Justice, and an Attorney General, who shall be the head thereof." 5 U.S.C. 291. That official, the chief law-enforcement officer of the Federal Govern-

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17. Federal Grand Jury Handbook, p. 9.

See In re Presentment by Grand Jury of Ellison, D.C.D. Del. 1942, 44 F. Supp. 375, aff'd 133 F. 2d 903, cert. den'd 318 U. S. 791.

ment is "the hand of the President in taking care that the laws of the United States in protection of the interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully executed." *Ponzi* v. *Fassenden*, 1922, 258 U. S. 254, 262, 42 S. Ct. 309, 66 L. Ed. 607. He "has the authority, and it is made his duty, to supervise the conduct of all suits brought by or against the United States", including the authority "to begin criminal prosecution". *United States* v. *San Jacinto Tin Co.*, 125 U. S. 273, 278-279, 8 S. Ct. 850, 31 L. Ed. 747. He "is invested with the general superintendence of all such suits, and all the district attorneys who do bring them in the various courts in the country are placed under his immediate direction and control." Id., p. 279; and see *In re Neagle*, 135 U. S. 1, 66, 10 S. Ct. 658, 34 L. Ed. 55.

The determination of whether and when to prosecute "is a matter of policy for the prosecuting officer and for the determination of the Courts". *District of Columbia* v. *Buckley*, D.C.Ct. App. 1942, 128 F.2d 17. As another court has stated it:

> "All of these considerations point up the wisdom of vesting broad discretion in the United States Attorney. The federal courts are powerless to interfere with his discretionary power. The Court cannot compel him to prosecute a complaint, or even an indictment, whatever his reasons for not acting. The remedy for any dereliction of his duty lies, not with the courts, but with the executive branch of our government and ultimately with the people." *Pugach* v. *Klein*, S.D.N.Y. 1961, 193 F. Supp. 630, 634.

"Congress, well aware of this discretion has never challenged its existence." Schwartz, Federal Criminal Juris-

diction and Prosecutors' Discretion, 13 L. & Cont. Prob. 64, 83 (1948).[18]

In the Confiscation Cases, 7 Wall. 454 (1868) the Supreme Court, over the objection of informers entitled to fees, allowed the Attorney General, in his discretion, to dismiss libels for the criminal condemnation of certain vessels under a statute permitting the seizure and condemnation of property knowingly used to aid insurrection against the United States. The statute made it the duty of the President to see to it that such property was seized and condemned. The Court relied not only upon the statutory authority of the Attorney General to control all prosecutions and civil actions brought by or against the United States, but also upon common law principles:

> "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, * * * Settled rule is that those courts will not recognize any

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18. Schwartz points up his comment with this significant illustration: "In the hearing on the confirmation of Attorney General Jackson as Associate Justice of the Supreme Court, the nomination was attacked because of Jackson's failure to prosecute Drew Pearson and Robert S. Allen for criminal libel on Senator Tydings. Jackson had taken the position that it was the policy of the Department of Justice to avoid the criminal libel laws when the courts were open to the injured party in civil proceedings, *and that prosecutions of this character would tend to impair freedom of the press.* (Emphasis supplied.) Republican Senator (now Mr. Justice) Burton stated:

> " 'The prosecuting attorney, being charged, as he is charged, with the great responsibility of deciding under the laws of the United States, the laws under which he is serving, whether a case should be prosecuted, owes a duty to himself, his community, and the Constitution to decide whether the case should be prosecuted. . . . In my judgment the Attorney General was within his rights when he declined to prosecute, and in stating the grounds as he did state them under the circumstances.' "

13 L. & Cont. Prob. at 83.

> suit, civil or criminal, as regularly before them, if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney, or some one designated by him to attend to such business in his absence, as may appertain to the duties of his office."

The functions of prosecutor and judge are incompatible. In *United States* v. *Thompson*, 1920, 251 U. S. 407, 40 S.Ct. 289, 64 L. Ed. 333, for example, the Supreme Court reversed a lower court for attempting to prevent a United States Attorney from instituting criminal prosecution by resubmitting the matter to a grand jury. The Court's decision was expressly based upon "the absolute right of the United States to prosecute," and upon "the right of the Government to initiate prosecutions for crime", a right not subject to control by judicial discretion. 251 U. S. at 412-413, 415. Similarly, the Court has held that a district court was without jurisdiction to refuse to issue a warrant of arrest upon an indictment by a grand jury upon the application of the United States Attorney, because such refusal would bar " 'the absolute right of the United States to prosecute' " and would bar "the lawful authority of the United States Attorney." *Ex parte United States*, 1932, 287 U. S. 241, 53 S. Ct. 129, 77 L. Ed. 283.

In *Goldberg* v. *Hoffman*, 7 Cir. 1955, 225 F.2d 463, a petition for mandamus was filed against the Attorney General, an Assistant Attorney General, and the United States Attorney, to compel them to relieve the petitioner of an indictment. The Court of Appeals dismissed as to the Attorney General and Assistant Attorney General for lack of jurisdiction:

> "Our adjudication of the issues raised must be guided by considerations inherent in the well settled principle of the separation of the powers vested in the three branches of government, which is the key-

note of our constitutional mandate. We must bear in mind that the United States Attorney is an officer of the executive branch responsible primarily to the President, and through him to the electorate, and that the remedy sought against Tieken is a broad one, to-wit, a direct mandate from this court compelling him to take, or refrain from taking a specific course of action with respect to the indictment pending against petitioner. More specifically, we are asked to review the exercise of administrative discretion, overrule the decision of the executive and direct the course which that discretion must take. We think such judicial control of an executive officer is beyond the power of this court." 225 F. 2d at 464.

See also *Moses* v. *Kennedy*, D.C. 1963, 219 F. Supp. 762, appeal pending.

In *United States* v. *Brokaw*, S.D. Ill. 1945, 60 F. Supp. 100 the court denied a motion for leave to file a petition as amicus curiae asking the court to enter an order directing the United States attorney to show cause why an order of *nolle prosequi* should not be vacated and the cause reinstated and set for trial. The court said:

> "That the United States District Attorney in his capacity as the public prosecutor in his district is clothed with the power and charged with the duties of the Attorney General in England under the common law is generally recognized and supported by the Federal Courts. United States v. Thompson, 1920, 251 U. S. 407. He is the representative of the public in whom is lodged a discretion which is not to be controlled by the courts, or by an interested individual, or by a group of interested individuals who seek redress for wrongs committed against them by use of the criminal process. In United States v. Thompson, supra, the Supreme Court held that courts have no power to control the initiation of criminal proceedings, that being the prerogative and duty of the United States District Attorney."

Thus, "courts generally refuse to order the prosecutor to initiate a prosecution on the ground that it is a discretionary act which may not be compelled by mandamus." Note, *Prosecutor's Discretion*, 103 Pa. L. Rev. 1057, 1058 (1955).

Rule 48(a) does not directly apply to the present case, because there has been no indictment, information, or complaint, but since the rule preserves the prosecutor's discretion to dismiss a complaint before indictment, the drafters of the Rules must have intended to preserve the discretion not to prosecute. In this case, the prosecutor cannot move to dismiss; there is nothing to dismiss. What he can do, however, is to refuse to prepare and sign the indictment. Under this theory, Rule 7(c), requiring that the indictment be signed by the United States Attorney, preserves the prosecutor's traditional discretion as to whether to initiate prosecution.

The reason for vesting discretion to prosecute in the Executive, acting through the Attorney General is twofold. First, in the interests of justice and the orderly, efficient administration of the law, some person or agency should be able to prevent an unjust prosecution. The freedom of the petit jury to bring in a verdict of not guilty and the progressive development of the law in the direction of making more meaningful the guarantees of an accused person's constitutional rights give considerable protection to the individual before and after trial. They do not protect against a baseless prosecution. This is a harassment to the accused and an expensive strain on the machinery of justice. The appropriate repository for authority to prevent a baseless prosecution is the chief law-enforcement officer whose duty, unlike the grand jury's duty, is to collect evidence on both sides of a case.

Second, when, within the context of law-enforcement, national policy is involved, because of national security,

conduct of foreign policy, or a conflict between two branches of government, the appropriate branch to decide the matter is the executive branch. The executive is charged with carrying out national policy on law-enforcement and, generally speaking, is informed on more levels than the more specialized judicial and legislative branches. In such a situation, a decision not to prosecute is analogous to the exercise of executive privilege. The executive's absolute and exclusive discretion to prosecute may be rationalized as an illustration of the doctrine of separation of powers, but it would have evolved without the doctrine and exists in countries that do not purport to accept this doctrine.[19]

IV.

This brings me to the facts. They demonstrate, better than abstract principles or legal dicta, the imperative necessity that the United States, through its Attorney General, have uncontrollable discretion to prosecute.

The crucial fact here is that Goff and Kendrick, two Negroes, testified in a suit by the United States against the Registrar of Clarke County, Mississippi, and the State of Mississippi to enforce the voting rights of Negroes under the Fourteenth Amendment and the Civil Rights Act. *United States* v. *Ramsey*, 5 Cir. 1964, 331 F.2d 824; rev'd on reh'g, 331 F.2d 838.

Goff and Kendrick testified that some seven years earlier at Stonewall, Mississippi the registrar had refused to register them or give them application forms. They said that they had seen white persons registering, one of whom was a B. Floyd Jones. Ramsey, the registrar, testified that Jones had not registered at that time or place, but had reg-

19. "Hobbes told us long ago, and everybody now understands that there must be a supreme authority, a conclusive power, in every state on every point somewhere." Bagehot, The English Constitution (1872) p. 248.

istered the year before in Enterprise, Mississippi. He testified also that he had never discriminated against Negro applicants for registration.[20] Jones testified that he was near the registration table in Stonewall in 1955, had talked with the registrar, and had shaken hands with him. The presiding judge, Judge W. Harold Cox, stated from the bench that Goff and Kendrick should be "bound over to await the action of the grand jury for perjury".[21]

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20. Judge Cox found "as a fact from the evidence that negro citizens have been discriminated against by the registrar", although he found also that there was "no pattern or practice of discrimination". In its original opinion in the Ramsey case this Court noted the "testimony which witness by witness convicts Ramsey of palpable discrimination." United States v. Ramsey, 5 Cir. 1964, 331 F.2d 824, 826. In his opinion Judge Rives noted that "This case reveals gross and flagrant denials of the rights of Negro citizens to vote." 331 F.2d at 833. And on rehearing, this Court ruled that the finding that "there was no pattern or practice in the discrimination by the Registrar" was "clearly erroneous." 331 F.2d at 838. No one has suggested that Mr. Ramsey may have been guilty of perjury.

21. When counsel for the State, Mr. Riddell, completed Mr. Ramsey's direct examination, and before his cross-examination, respondent Judge W. Harold Cox, who was presiding, stated:

> I want to hear from the government about why this Court shouldn't require this Negro Reverend W. G. Goff and his companion Kendrick to show cause why they shouldn't be bound over to await the action of the grand jury for perjury. I want to hear from you on that.
>
> * * *
>
> I think they ought to be put under about a $3,000.00 bond each to await the action of a grand jury. Unless I change my mind that is going to be the order.
>
> BY MR. STERN [Government counsel]: I will be happy to reconcile their testimony.
>
> BY THE COURT: I just want these Negroes to know that they can't come into this Court and swear to something as important as that was and is and get by with it. I don't care who brings them here.
>
> BY MR. STERN: I understand.
>
> BY THE COURT: Yes sir. And I mean that for whites alike, but I am talking about the case at hand. I just don't intend to put up with perjury. That is something I will not tolerate. All right."

In January 1963 attorneys of the Department of Justice requested the Federal Bureau of Investigation to investigate the possible perjury. The FBI completed a full investigation in March 1963 and referred the matter to the Department's Criminal Division. In June 1963 the Criminal Division advised the local United States Attorney, Mr. Hauberg, that the matter presented "no basis for a perjury prosecution". Mr. Hauberg informed Judge Cox of the Department's decision. Judge Cox stated that in his view the matter was clearly one for the grand jury and that he would be inclined, if necessary, to appoint an outside attorney to present the matter to the grand jury. (I find no authority for a federal judge to displace the United States Attorney by appointing a special prosecutor.) On receiving this information, the Criminal Division again reviewed its files and concluded that the charge of perjury could not be sustained. General Katzenbach, then Deputy Attorney General, after reviewing the files, concurred in the Criminal Division's decision. In September 1963 General Katzenbach called on Judge Cox as a courtesy to explain why the Department had arrived at the conclusion that no perjury was involved. Judge Cox, unconvinced, requested the United States Attorney to present to the grand jury the Goff and Kendrick cases, which he regarded as cases of "palpable perjury".

In October 1963 Goff and Kendrick were arrested, jailed for t days, and placed on a $3,000 bond for violations of State law for falsely testifying in federal court. After their indictment by a state grand jury, the Department of Justice filed suit against the State District Attorney, *United States* v. *Warner*, (Civ. No. 1219, S.D.Miss.), seeking to enjoin the state prosecution on the grounds that: (1) the States have no authority to prosecute for alleged perjury committed while testifying in a federal court; (2) the purpose and effect of the State's prosecution was to threaten and intimidate Goff and Kendrick and to inhibit

them and other Negroes from registering to vote. See *United States* v. *Wood*, 5 Cir. 1961, 295 F.2d 772; *United States* v. *Harvey*, 5 Cir. . . ., . . . F.2d . . . The district court (per Mize, J.) ruled in favor of the United States, citing *In re Loney*, 1890, 134 U. S. 372, 10 S. Ct. 584, 33 L. Ed. 949, and 42 U.S.C. 1971(b) prohibiting intimidation for the purpose of interfering with voting rights.

The Federal Grand Jury, originally convened on September 9, 1963, was reconvened on September 21, 1964. September 28, 1964, the Foreman of the Grand Jury advised the Government Attorney who was presenting matters to the Grand Jury that Judge Cox had asked the Foreman to hear several witnesses. September 29, 1964, Mr. Riddell, attorney for the Registrar, and the district attorney for the Second Circuit District for the State of Mississippi, Mr. Holleman, came to the courthouse to appear before the Grand Jury. Judge Mize, in a special charge to the Grand Jury stated—in open court—that Judge Cox had informed him, before leaving for his vacation, that:

> * * * he wanted the Grand Jury to call before it Mr. Boyce Holleman of Gulfport, Mississippi and Mr. Talley [sic] Riddell of Quitman, Mississippi as witnesses, because it was his impression that they had some matters that ought to be investigated at least and that they should be permitted to appear.

Judge Mize stated that he was not familiar with the matters "other than just what Judge Cox requested me to do, to see to it that these two witnesses had an opportunity to appear before the Grand Jury." Judge Mize advised the Grand Jury that they had a right to hear the testimony of Messrs. Riddell and Holleman, but requested them not to do so until October 21, 1964, the day after Judge Cox was to return from his vacation.

October 20 Mr. Katzenbach talked with Judge Cox by telephone, reiterating the Department's position. He also

instructed Mr. Hauberg not to prepare or sign indictments. October 22 the foreman of the grand jury in open court informed Judge Cox that Mr. Hauberg had declined to assist in preparing true bills. The United States Attorney stated that "the Department of Justice and the United States felt as if that the law and the fact was not sufficient to constitute perjury and that an indictment thereon would be no good." Judge Cox said:

> "I here and now order and direct you to disregard your instructions from the Department of Justice and to prepare true bills or no bills as this Grand Jury may direct you to do and to sign those bills or no bills as the Grand Jury may decide under penalty of contempt, * * *."

Judge Cox recessed court for one hour. During this recess Mr. Hauberg and Mr. Katzenbach conferred by telephone; the Attorney General directed the United States Attorney not to prepare or sign perjury indictments of Goff and Kendrick. Court reopened. Mr. Hauberg respectfully declined to comply with the court's order. Judge Cox forthwith adjudged him "guilty of civil contempt", ordered him confined to a jail in Hinds County, ordered the issuance of a citation to the Acting Attorney General to appear before the court to show cause why he should not be held in contempt; and stayed the order for a period of five days.

* * *

Against the backdrop of Mississippi versus the Nation in the field of civil rights, we have a heated but bona fide difference of opinion between Judge Cox and the Attorney General as to whether two Negroes, Goff and Kendrick, should be prosecuted for perjury. Taking a narrow view of the case, we would be justified in holding that the Attorney General's implied powers, by analogy to the express powers of Rule 48(a), give him discretion to prosecute. Here there was a bona fide, reasonable exercise of discretion made after a full investigation and long consideration

of the case—both sides of the case, not just the evidence tending to show guilt. If the grand jury is dissatisfied with that administrative decision, it may exercise its inquisitorial power and make a presentment in open court.[22] It could be said, that is all there is to the case.

This Court, along with everyone else, knows that Goff and Kendrick, if prosecuted, run the risk of being tried in a climate of community hostility. They run the risk of a punishment that may not fit the crime. The Registrar, who provoked the original litigation, runs no risk although the district court, in effect, found that he did not tell the truth on the witness stand. In these circumstances, the very least demands of justice require that the discretion to prosecute be lodged with a person or agency insulated from local pressures and parochial pride. This is not the hard case that makes bad law. This is the type of case that comes up, in one way or another, whenever the customs, beliefs, or interests of a region collide with national policy as fixed by the Constitution or by Congress. It is not likely that the men who devised diversity jurisdiction expected to turn over to local juries the discretionary power to bring federal prosecutions. This case is unusual only for the clarity with which the facts, speaking for themselves, illuminate the imperative necessity in American Federalism that the discretion to prosecute be lodged in the Attorney General.

The decision not to prosecute represents the exercise of a discretion analogous to the exercise of executive privilege. As a matter of law, the Attorney General of the

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22. Younger points out, however, that every known instance of an impasse after presentment was resolved by political action. In one instance Theodore Roosevelt, then governor of New York, removed a district attorney from office who had refused to prosecute. Younger, The People's Panel: The Grand Jury in The United States, 1634-1941, at 188-90 (1963).

United States has concluded that there is not sufficient evidence to prove perjury. As a matter of fact, the Attorney General has concluded, as he pleaded in *United States* v. *Warner*, that trial for perjury would have the effect of inhibiting not only Goff and Kendrick but other Negroes in Mississippi from registering to vote. There is a conflict, therefore, between society's interest in law enforcement (diluted in this case by the Attorney General's conclusion that the evidence does not support the charge of guilt) and the national policy, set forth in the Constitution and the Civil Rights Acts, of outlawing racial discrimination. The resolution of this conflict must lie in the unfettered discretion of the executive.

My memory, like Judge Rives's memory, goes back to the days when we had "an Attorney General suspected of being corrupt." I am not aware, however, that we have had more lawless Attorneys General than lawless juries.

APPENDIX B

Judgment of the Court of Appeals for the Fifth Circuit

Judgment

Before TUTTLE, Chief Judge, and RIVES, JONES, BROWN, WISDOM, GEWIN and BELL, Circuit Judges.

These causes came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

UPON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal as to Katzenbach, Acting Attorney General, be, and the same is hereby dismissed; the order on the appeal of Hauberg, United States Attorney be, and the same is hereby, reversed; and that the Petition for Writ of Prohibition is denied, all in conformity with the opinion of this Court.

January 26, 1965

RIVES, GEWIN and BELL, Circuit Judges, concur in part and dissent in part.

BROWN, Circuit Judge, specially concurs.

WISDOM, Circuit Judge, specially concurs.

Issued as Mandate: Jan. 26, 1965

APPENDIX C

Order of October 22, 1964

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

In the Matter of Grand Jury Investigations of October 21 and October 22, 1964, and Refusal of United States Attorney on Advice of Acting United States Attorney General to Aid and Assist the Grand Jury As Directed by the Court; and Order of Commitment of United States Attorney for Civil Contempt; and for Issuance of Citation to Acting Attorney General of the United States to Show Cause; and Granting of Stay of Execution

THE GRAND JURY, duly elected, impaneled and organized, for the Southern District of Mississippi, re-convened on order of the Court at 9:00 A.M., October 21, 1964, in Courtroom Number 2 in Jackson, Mississippi, for the general dispatch of its business. The grand jury was fully instructed as to their duties, powers and responsibilities and retired to the grand jury room number 538 in the Federal Building at Jackson to do its work. The United States Attorney (and one of his assistants) sat with the grand jury throughout the day on October 21 and explained in detail to the grand jury the perjury laws and the Court's construction of such laws for their information. The grand jury heard witnesses throughout the day on October 21, 1964. On the morning of October 22, 1964, the grand jury, through its foreman, made known to the Court in open court that they had requested Robert E. Hauberg, United States Attorney, to prepare certain indictments which they de-

sired to bring against some of the persons under consideration and about which they had heard testimony, and the United States Attorney refused to draft or sign any such indictments on instructions of the Acting Attorney General of the United States; whereupon the Court ordered and directed said United States Attorney to draft such true bills or no bills as the grand jury may have duly voted and desired to report and to sign such instruments as required by law under penalty of contempt. The United States Attorney was afforded one hour within which to decide as to whether or not he would abide by the instructions and order of the Court in such respect. At the end of such time, the Court re-convened and the United States Attorney was specifically asked in open court as to whether or not he intended to conform with the order and direction of the Court in said respects whereupon the United States Attorney answered that he respectfully declined to do so on instructions from Nicholas de Katzenbach, Acting Attorney General. He was thereupon duly adjudged by the Court to be in civil contempt of the Court and was afforded an opportunity to make any statement which he desired to make to the Court before sentence; whereupon the United States Attorney reiterated his inability to comply with the order of the Court upon express and direct instructions from Nicholas de Katzenbach, Acting Attorney General of the United States.

WHEREFORE, IT IS ORDERED AND ADJUDGED by the Court that Robert E. Hauberg, United States Attorney, is guilty of civil contempt of this Court and in the presence of the Court for his said refusal to obey its said order and he is ordered into custody of the United States Marshal to be confined by him in the Hinds County, Mississippi, jail, there to remain until he purges himself of this contempt by agreeing to conform to said order by performing his official duty for the grand jury as requested in the several (about

five) pending cases before them on October 21 and October 22, 1964.

IT IS FURTHER ORDERED by the Court that a citation issue to Nicholas de Katzenbach, Acting Attorney General of the United States, directing him to appear before this Court and show cause why he should not be adjudged guilty of contempt of this Court for his instructions and directions to the United States Attorney to disregard and disobey the orders of this Court in the respects stated.

The United States Attorney requested a stay of enforcement of this order and further proceedings herein for five days after this date to enable him to apply to the United States Court of Appeals for the Fifth Circuit for a writ of prohibition, and such request is granted; and these proceedings and the enforcement of this order in its entirety is stayed for five days, subject to the further orders of the United States Court of Appeals on said application; and for the enforcement of all of which, let proper process issue.

ORDERED AND ADJUDGED, this October 22, A.D., 1964.

/s/ Harold Cox
UNITED STATES DISTRICT JUDGE

A TRUE COPY, I HEREBY CERTIFY.
LORYCE E. WHARTON, CLERK
By /s/ C. Thomas
Deputy Clerk

APPENDIX D

U.S.C.A. Constitution P. 377

ARTICLE II—THE PRESIDENT

Section 3. Messages; Convene and Adjourn Congress; Receive Ambassadors; Execute Laws; Commission Officers

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; *he shall take Care that the Laws be faithfully executed,* and shall Commission all the Officers of the United States.

APPENDIX E

U.S.C.A. Constitution P. 379

ARTICLE III—THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction—to Controversies to which the United States shall be a Party;—to Controversies between two or more states;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * *

APPENDIX F

U.S.C.A. Constitution Amendments 1 to 5 P. 297

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX G

Title 18, U.S.C.A. Rules of Criminal Procedure PP. 138, 176

III. INDICTMENT AND INFORMATION

Rule 6. The Grand Jury (P. 138)

* * *

(d) *Who May be Present.* Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) *Secrecy of Proceedings and Disclosure.* Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise, a juror, attorney, interpreter or stenographer may disclose matters preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

* * *

Rule 7. The Indictment and the Information (P. 176)

(a) *Use of Indictment or Information.* An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

* * *

(c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. *It shall be signed by the attorney for the government.* It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

* * *

APPENDIX H

Title 18, U.S.C.A. Rules of Criminal Procedure P. 377

GENERAL PROVISIONS

Rule 48. Dismissal

(a) *By Attorney for Government.* The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) *By Court.* If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

APPENDIX I

Title 28, U.S.C.A. Judiciary and Judicial Procedure P. 230

COURTS OF APPEALS—JURISDICTION

Sec. 1291. *Final decisions of district courts*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX J

Title 28, U.S.C.A. Judiciary and Judicial Procedure P. 42

SUPREME COURT—JURISDICTION

Sec. 1254. *Courts of appeals; certiorari; appeal; certified questions*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

CERTIFICATE OF SERVICE

I, L. ARNOLD PYLE, one of the Attorneys for the Petitioner herein and a Member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served printed copies of the foregoing Petition for a Writ of Certiorari on the Respondents in the manner following:

1. By mailing five (5) printed copies thereof in a duly addressed envelope, with air mail postage prepaid, to Honorable John W. Douglas, Assistant Attorney General, Department of Justice, Washington, D. C. 20530, and by mailing two (2) printed copies thereof in a duly addressed envelope, with air mail postage prepaid, to David L. Rose, Esq., Department of Justice, Washington, D.C. 20530, said Messrs. Douglas and Rose being the attorneys who presented Respondents in the court below;

2. By mailing three (3) printed copies thereof in a duly addressed envelope, with air mail postage prepaid, to Honorable Archibald Cox, The Solicitor General, Department of Justice, Washington, D.C. 20530; and

3. By mailing one (1) printed copy thereof in a duly addressed envelope, with regular postage prepaid, to Honorable Robert E. Hauberg, United States Attorney, Federal Building, Jackson, Mississippi.

I further certify that I have this date mailed, postage prepaid, forty (40) printed copies thereof to the Clerk, United States Supreme Court, Washington, D.C. 20530.

This 9 day of April, 1965.

L. Arnold Pyle

L. Arnold Pyle
1347 Deposit Guaranty Bank Building
P. O. Box 427
Jackson, Mississippi
One of the Attorneys for Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1055

HONORABLE W. HAROLD COX, UNITED STATES DISTRICT JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, PETITIONER

v.

HONORABLE ROBERT E. HAUBERG, UNITED STATES ATTORNEY FOR SOUTHERN DISTRICT OF MISSISSIPPI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals sitting *en banc* (Pet. App. A1-A57) are reported at 342 F. 2d 167. The order of the district court (Pet. App. A59-A61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 26, 1965. The petition for a writ of

certiorari was filed on April 12, 1965. The jurisdiction of this Court is invoked under 28 U.S. 1254(1).

QUESTION PRESENTED

Whether a district judge has authority to compel a United States Attorney to sign proposed indictments when the Attorney General has determined that prosecutions would not be warranted and has instructed the United States Attorney not to sign the indictments.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent provisions of the Constitution, and the Federal Rules of Criminal Procedure, and of relevant statutes, executive orders and reorganization plans are set forth in the Appendix, *infra*, pp. 22-31.

STATEMENT

The present petition asserts the validity of an order entered on October 22, 1964 by petitioner, District Judge Cox, insofar as it adjudges respondent United States Attorney Hauberg in contempt for declining to obey the judge's direction to prepare and sign certain proposed indictments, notwithstanding express instructions to the contrary from the Acting Attorney General of the United States. The further provision of the order in suit directing that a citation issue to then Acting Attorney General Katzenbach to show cause why he too should not be held in contempt is not before the Court.

1. The basic facts leading to petitioner's order of October 22, 1964, are uncontroverted:

The controversy arises out of the testimony of two witnesses for the United States in a suit brought under the Civil Rights Act against the Registrar of Clarke County, Mississippi and the State of Mississippi to enforce the voting rights of Negroes.[1] The witnesses, Goff and Kendrick, both Negroes, testified that some seven years earlier they had attempted to register at an out-of-door place of registration in Stonewall, Mississippi; that the Registrar, Mr. Ramsey, had declined to register them or give them application forms; that they had seen white persons registering there on that day; and that one white man, B. Floyd Jones, had been near the registration table, had talked to the Registrar, Mr. Ramsey, and had signed the registration book (R. 63-64, 75-79).[2] Ramsey testified that Jones had not registered at that time or place, and his registration book showed that Jones had registered a year earlier at Enterprise (R. 82-87). Jones later testified for the Registrar and State that he was near the registration table in Stonewall and had observed white persons registering there and that he had talked to the Registrar, Ramsey, and had shaken hands with him, but

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[1] *United States* v. *Ramsey*, 331 F. 2d 824, modified on rehearing, 331 F. 2d 838 (C.A. 5).

[2] "R. ——" references are to the record reproduced in the court of appeals.

stated that he was not then registering (R. 97-99, 101-104).

Petitioner, Judge Cox, who was presiding, expressed the view that "this Negro Reverend W. G. Goff and his companion Kendrick" should each be put under a $3000 bond "to await the action of the grand jury for perjury" (Pet. App. A52, n. 21; R. 91-92, see also R. 99-100).

After a full investigation by the Federal Bureau of Investigation into the allegations of perjury against Goff and Kendrick, the Criminal Division of the Department of Justice concluded that there was "no basis for a perjury prosecution," and respondent Hauberg advised Judge Cox of the decision not to prosecute (R. 31). Judge Cox stated his view that the matter was one for a grand jury, and expressed his inclination to appoint an outside attorney to present the matter to the grand jury. After the Department furnished Judge Cox with a memorandum indicating the district court's lack of authority to appoint a special prosecutor, Judge Cox, in another discussion of the matter with respondent Hauberg, emphasized his desire to have the perjury matters presented to the grand jury, and his intent to instruct the grand jury which was to be impanelled shortly on these matters (R. 31-32).

The Criminal Division of the Department of Justice again reviewed the matter and concluded that the charge of perjury could not be sustained (R. 32). Mr. Katzenbach, who was then Deputy Attorney Gen-

eral, reviewed the matter himself, and concurred in the Criminal Division's decision not to prosecute. On September 7, 1963, he went to Jackson, Mississippi and met with Judge Cox. He explained that, because he knew that Judge Cox "had strong feelings in the matter," he "had come to pay him the courtesy of explaining why" the Department of Justice had "arrived at the conclusion that no perjury was involved" (R. 26). Judge Cox remained unconvinced and indicated his belief that Goff and Kendrick had committed "palpable perjury," but stated that he would not instruct the grand jury on the subject (Answer to Petition for Writ of Prohibition in Court of Appeals, p. 9; R. 26).

Approximately one month later Goff and Kendrick were arrested, confined in jail for two days, and placed on $3000 bond for violations of State law for falsely testifying in federal court before Judge Cox in the *Ramsey* case. The arrests were based upon affidavits filed by Tally Riddell, counsel for the Registrar and the State in the *Ramsey* case (R. 38, 43-46, 53). After Goff and Kendrick had been indicted by a State grand jury (R. 38-39, 53-54), the United States, through the Department of Justice, filed suit [3] against the State district attorney to enjoin the State prosecution on the ground, among others, that the purpose and effect of the prosecution was to threaten and coerce Goff and Kendrick and to intimidate them and other Negro voters for the purpose of interfering with their right to vote. In April, 1964, the district court (per Mize, J.) ruled that the threatened State

[3] *United States* v. *Warner* (Civ. No. 1219, S.D. Miss.).

prosecution was barred by the principle announced in *In re Loney*, 134 U.S. 372, and was "contrary to the provisions of 42 U.S.C. 1971(b)" (R. 57-59).

After the federal Grand Jury (which had originally been convened in September 1963) was reconvened in September 1964, the foreman advised the attorney for the government assigned to the jury that Judge Cox has asked the foreman to hear a couple of witnesses on matters unrelated to those then being considered (R. 34). On September 29, Mr. Riddell, counsel for the Registrar and State in the *Ramsey* case, and a State district attorney, came to the courthouse to appear before the Grand Jury.

In a special charge to the Grand Jury, Judge Mize stated that Judge Cox had requested him "to see that these two witnesses had an opportunity to appear before the Grand Jury" (R. 7, 5; Pet. App. A54). Judge Mize advised the Grand Jury of its right to hear the testimony of the two witnesses, but requested them not to do so until October 21, 1964, shortly after Judge Cox was to return from his vacation (R. 7-11).

On October 20, 1964, Mr. Katzenbach, then Acting Attorney General, having been advised by respondent Hauberg that the perjury matters would probably be presented to the Grand Jury when it convened the next day, talked with Judge Cox by telephone, reiterating his view that there was no basis for prosecution (R. 26-27). Judge Cox advised Mr. Katzenbach that he had nothing to do with the matter, except that he had advised Mr. Riddell of the name of the foreman of the Grand Jury, and had suggested that

if he (Riddell) spoke to the foreman, the foreman could have him subpoenaed (R. 27).

On October 21, 1964, Mr. Katzenbach advised Mr. Hauberg that it was still his view that the cases should not be prosecuted, and instructed him not to prepare or sign indictments incorporating these charges—or proposed indictments growing out of other matters which the Grand Jury was considering which had not come to the attention of the United States Attorney or the Department of Justice, and thus had not been investigated (R. 27-28). When the Grand Jury reconvened, Judge Cox advised it that it had authority to hear any witness it desired to hear.

On the morning of October 22, the foreman of the Grand Jury advised Judge Cox in open court that it had three matters under consideration, that it had concluded two of them and that the third was in the process of being concluded (R. 17). He stated that the Grand Jury had requested Mr. Hauberg to assist in preparing true bills, and that Mr. Hauberg had replied that he could not do so without securing permission from the Department in Washington and, later, that he had been instructed not to do so (R. 17-18). The foreman added that the Grand Jury did not know what to do in the event that they should vote for an indictment (R. 17-18). Mr. Hauberg stated that as to one of the matters "the Department of Justice and the United States felt as if the law and the fact was not sufficient to constitute perjury and that an indictment thereon would be no good" (R. 18).

When Judge Cox asked if that was in connection with the two witnesses for the government, Mr. Hauberg replied in the affirmative (R. 18). He also stated that the Attorney General had requested an F.B.I. investigation of the matters with which the United States Attorney and the Department of Justice were not familiar; but that Mr. Katzenbach had instructed him not to proceed or prepare or sign any indictments in any of these three matters (R. 18-19).

Judge Cox then stated (R. 19):

> * * * I here and now order and direct you to disregard your instructions from the Department of Justice and to prepare true bills or no bills as this Grand Jury may direct you to do and to sign those bills or no bills as the Grand Jury may decide under penalty of contempt, * * *.

During a one hour court recess, Mr. Hauberg conferred with Mr. Katzenbach by telephone. The Attorney General specifically instructed Mr. Hauberg not "to prepare or to sign indictments in the matters being heard" by the Grand Jury (R. 20, 28).

When court reconvened, Judge Cox again inquired as to whether Mr. Hauberg would comply with his direction to prepare and sign the indictments. Mr. Hauberg respectfully declined to do so (R. 20-21). Judge Cox forthwith adjudged Mr. Haubert "guilty of civil contempt," ordered him confined to a Hinds County jail, and ordered the issuance of a citation to Acting Attorney General Katzenbach to show cause why he too should not be held in contempt, and stayed the order for five days (R. 1-3, 21-22).

2. Notice of appeal was filed on October 23 by Messrs. Hauberg and Katzenbach (R. 105), and they, together with the United States, filed a petition in the Court of Appeals for the Fifth Circuit for a writ of prohibition, and for a stay of the order of October 22, 1964, pending disposition of the proceedings by that court. By order of October 26, 1964, the court granted such a stay and ordered the proceedings on appeal and on the writ to be consolidated for briefing and argument. Thereafter, the court ordered the proceedings to be heard and determined *en banc*.

The court reversed Judge Cox's order of October 22, holding that the United States Attorney is under no duty to sign an indictment, and that "the affixing or withholding of the signature is a matter of executive discretion which cannot be coerced or reviewed by the courts" (Pet. App. A8). The appeal of the Acting Attorney General was dismissed because the order of October 22, 1964 was, as to him, interlocutory and not appealable (Pet. App. A8-A9). Similarly, the court denied the application for a writ of prohibition, because the reversal of the order of October 22 as to the United States Attorney rendered the writ of prohibition unnecessary as to him, and made it "improbable" that it would be necessary as to the Attorney General (Pet. App. A9).

Judges Jones, Tuttle and Wisdom were of the opinion that, since the district court has no authority to compel the United States Attorney to sign an indictment, it had no authority to compel the United States Attorney to "indulge in an exercise of futility by the preparation of the form of an indictment which he is

unwilling to vitalize with his signature" (Pet. App. A8). Judge Brown agreed that the United States Attorney could not be compelled to sign the indictment, but was of the view that he was required to give assistance to a grand jury, and particularly that he has a duty to the grand jury to prepare a form of indictment when requested to do so (Pet. App. A27-A28, A31-A35).

Judges Rives, Gewin and Bell dissented on the ground that Rule 7(c) of the Federal Rules of Criminal Procedure imposed an affirmative duty upon the attorney for the government to sign an indictment returned by a grand jury (Pet. App. A-10-A27, A14-A18). The dissenters believed that the Fifth Amendment confers upon the grand jury the authority to institute a criminal prosecution, and that a defendant can be required to appear and give bond (or be arrested), and to answer or plead to a grand jury indictment, even if returned over the objection or without the concurrence of the prosecutor (Pet. App. A13-A14, A19-A21). They were of the view that the signature of the government's attorney could be compelled by the court because it was merely an attestation of the act of the grand jury, and thus a "purely ministerial act" (Pet. App. A16-A17).

ARGUMENT

The sole issue raised by this petition is whether a district judge has authority to compel a United States Attorney to sign a grand jury's indictment, and thus to adopt it as a pleading of the United

States, when the Attorney General has determined that no prosecution should be instituted against the defendant and instructed the government's attorney not to sign the indictment.

In our view, a judicial order of this character constitutes an unwarranted intrusion into the executive function of determining whether and when criminal prosecutions on behalf of the United States should be instituted and cannot be sustained without serious and disruptive effect on the orderly administration of criminal justice. By the same token, the decision of the court of appeals denying judicial authority in the premises is not in conflict with any decisions of any other federal courts, but is, rather, in accord with the uniform decisions of this Court and the lower courts confirming the discretionary authority of the Executive, and particularly the Attorney General, to determine whether and when criminal prosecutions are to be instituted. While three judges of the court of appeals dissented, the issues separating the dissenters from the majority were narrow, and all seven of the judges of that court agreed that, in circumstances such as those at bar, the Attorney General's discretion to prevent a prosecution from going forward could not be reversed or coerced by any district judge. Accordingly, there is no occasion for review by this Court.

1. The President's constitutional responsibility and authority to "take Care that the Laws be faithfully executed" (Article II, Sec. 3, *infra*, p. 22), insofar as it pertains to the enforcement of criminal laws and the bringing of prosecutions for offenses against the

United States, has, by statute [4] and executive order,[5] as well as by tradition,[6] been vested in the Attorney General as the chief law enforcement officer of the Executive. The Attorney General has express authority to supervise and direct all United States Attorneys in the performance of their duties, including prosecutions for all offenses against the United States,[7] and he has been given "the function of decision whether and in what manner to prosecute * * * or to abandon prosecution." [8] Accordingly, the courts have consistently held that determinations with respect to the institution of criminal proceedings are committed to the discretion of the Attorney General or other attorney for the government [9] and that the courts have no

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[4] 28 U.S.C. 507, 501, 503, 504, 508, 5 U.S.C. 291, 309, 310.

[5] Executive Order No. 6166, Sec. 5, June 10, 1933, 5 U.S.C. (1958 ed.), p. 141, *infra*, p. 26. See, also, Reorganization Plan No. 2 of 1950, 15 Fed. Reg. 3173, 64 Stat. 1261, 5 U.S.C. (1958 ed.), p. 185.

[6] *E.g., Ponzi* v. *Fessenden*, 258 U.S. 254, 262: "He is the hand of the President in taking care that the laws of the United States * * * in the prosecution of offences, be faithfully executed."

[7] 28 U.S.C. 507.

[8] Executive Order No. 6166, Section 5, June 10, 1933, *supra*.

[9] *E.g., Deutsch* v. *Aderhold*, 80 F. 2d 677, 678 (C.A. 5) (United States Attorney is "vested with complete control over the proceedings, in the exercise of sound discretion"); *Swepston* v. *United States*, 289 F.2d 166 (C.A. 8), certiorari denied, 369 U.S. 812 (same statement); *District of Columbia* v. *Buckley*, 128 F.2d 17, 20 (C.A.D.C.) ("determination of whether and when to prosecute * * * is a matter of policy for the prosecuting officer and not for determination of the

authority to prevent [10] or compel [11] the initiation of such prosecutions. For the same reasons, this Court

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courts"); *Felder* v. *United States*, 9 F. 2d 872, 874 (C.A. 2), certiorari denied, 270 U.S. 648; *Clemons* v. *United States*, 137 F. 2d 302, 305 (C.A. 4); *Cooper* v. *O'Connor*, 99 F. 2d 135, 138 (C.A. D.C.), certiorari denied, 305 U.S. 642; *Brown* v. *United States*, 299 F. 2d 438, 440 (C.A.D.C.); *Ex parte Altman*, 34 F. Supp. 106, 108 (S.D. Cal.); *United States* v. *New York Great Atlantic & P. Tea Co.*, 54 F. Supp. 257, 258 (N.D. Tex.).

[10] *United States* v. *Thompson*, 251 U.S. 407, 412-413 ("the absolute right of the United States to prosecute" held not subject to control by judicial discretion); *Ex parte United States*, 287 U.S. 241, 251 (district court without authority to refuse application of United States Attorney for warrant upon an indictment because such refusal would bar "the absolute right of the United States to prosecute" and the "lawful authority of the United States attorney"); *Goldberg* v. *Hoffman*, 225 F. 2d 463, 464-465 (C.A. 7); *United States* v. *Brokaw*, 60 F. Supp. 100, 101 (S.D. Ill.).

[11] *Moses* v. *Kennedy*, 219 F. Supp. 762 (D.D.C.), affirmed, C.A.D.C. No. 18065, Feb. 16, 1965 (dismissing action to require Attorney General to investigate, arrest and prosecute law enforcement officers of State of Mississippi for asserted violations of Civil Rights Acts); *Miliken, et al.* v. *Stone, U.S. Atty. Gen., et al.*, 7 F. 2d 397, 399 (S.D.N.Y.), affirmed, 16 F. 2d 981 (C.A. 2), certiorari denied, 274 U.S. 748 (dismissing suit to compel enforcement of the provisions of the National Prohibition Act); *Pugach* v. *Klein*, 193 F. Supp. 630, 634-635 (S.D. N.Y.) (dismissing mandamus action to compel United States Attorney to prosecute several persons for alleged violations of the Federal Communications Act); *Parker* v. *Kennedy*, 212 F. Supp. 594 (S.D. N.Y.) (dismissing petition for mandamus to compel the Attorney General and United States Attorney to institute proceedings based upon alleged violations of the antitrust laws); also, *People* v. *Miles*, 177 F. Supp. 172 (W.D. Mich.) (dismissing a mandamus action to compel the United States Attorney to investigate an alleged conspiracy).

early viewed it as settled not only that "Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction" of the Attorney General or the United States Attorney, but also that the "courts will not recognize any suit, civil or criminal, as regularly before them if prosecuted in the name and for the benefit of the United States, unless the same is represented by the district attorney [or other designated attorney for the government]". *Confiscation Cases*, 7 Wall. 454, 457. The decision below—that a district judge has no authority to compel the United States Attorney to accept grand jury accusations as a pleading of the United States—is simply a reaffirmation of this settled principle.

2. Against this background, it is difficult to understand the contention that the United States Attorney can be compelled to give validity to an indictment by affixing his signature. The court below holds legally ineffective an indictment (or "presentment") which is not signed by the government's attorney. That conclusion is in accord with Rule 7(c) of the Rules of Criminal Procedure which makes such signature an essential part of a valid accusation. It would seem to follow that the prosecutor's signing—which gives the indictment life—is a meaningful act, not a mere formality. Yet, the petitioner and the dissent below argue that the signature of the government's attorney, albeit indispensable, is no more than a third authentication of the

grand jury's action which the prosecutor has a ministerial duty to affix.

The argument apparently derives from a misreading of Rule 7(c). To be sure, the Rule provides that accusatory pleadings "shall be signed by the attorney for the government." But there is here no unqualified imperative that the prosecutor shall endorse every accusation preferred by the grand jury. The rule merely requires the government attorney's signature on every pleading that is intended to initiate a prosecution. That is plainly shown by the pairing of indictments and informations in the cited provision. It could hardly be argued that an attorney for the government has a ministerial duty to sign every paper entitled "information." The signature requirement of Rule 7(c) simply implements the rule that every pleading of the government in criminal proceedings (Rule 12, Fed. R. Crim. P., *infra*, p. 31) be endorsed by its authorized representative,[12] just as the Civil

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[12] *Crowley* v. *United States*, 194 U.S. 461, 475, relied upon by petitioner and the dissenting opinion for the proposition that the prosecutor's signature does not constitute the adoption of a paper as a pleading, but merely attests the action of the grand jury, was, of course, decided long before the adoption of the Federal Rules. At any rate this Court's statement that "the signature of the United States Attorney merely attests the action of the grand jury," was made in rejecting the contention that an indictment containing the prosecutor's signature should be treated as an information. The Court simply was emphasizing that in an information the charge is "the responsibility of the attorney representing the Government, and imports an investigation of the facts by him in his official capacity" whereas the indictment represents an accusation by the grand jury, based perhaps on its investigation. There is no suggestion in this Court's opinion in *Crowley*

Rules, upon which the Criminal Rules were modeled, require the endorsement of every civil pleading.[13]

3. No contrary inference can properly be drawn from the requirement of the Fifth Amendment that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." That provision makes no affirmative grant of authority to grand juries; it merely confines the power of the government to bring criminal prosecutions. The Fifth Amendment was written for the protection of the rights of individuals, particularly as a security "to the innocent" from the "trouble, expense, and anxiety" which might be caused by "hasty, malicious, and oppressive public prosecutions." *Ex parte Bain*, 121 U.S. 1, 6, 10-12; *Stirone* v. *United States*, 361 U.S. 212, 218. It would be anomalous to read this constitutional provision—conceived as a shield against baseless prosecutions—as compelling the government to institute criminal proceedings where the prosecutor believes the grand jury accusation baseless or otherwise not meriting prosecution.[14]

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that an attorney for the government was required to endorse a grand jury action which he believed to be ill founded.

[13] Rule 11, Fed. R. Civ. P.; Notes of the Advisory Committee to Rules 7 and 12, 18 U.S.C. App., pp. 3414-3415, 3417. Because the defendant's plea in criminal matters is normally made in person and orally in open court, the criminal rules require no signature for the defendant's pleadings. Rules 10 and 11, Fed. R. Crim. P.

[14] As Judge Brown noted (Pet. App. A29-A30):

"The aim of the Grand Jury indictment as the means of protecting the citizen against the initiation of unfound-

To be sure, while the grand jury's primary function is to prevent the prosecutor from instituting unjustified criminal proceedings, the law has committed additional responsibilities to it, particularly the authority to investigate into possible crimes and to make public accusations upon its own initiative. *Hale* v. *Henkel*, 201 U.S. 43; *United States* v. *Thompson*, 251 U.S. 507. But the grand jury remains an "informing and accusing tribunal only." *Charge to Grand Jury*, 30 Fed. Cas. No. 18,255, pp. 992-993 (C.C.Cal., per Mr. Justice Field). Its power to make investigations and public accusations has never been construed to include authority to prosecute the persons accused, or to institute a criminal prosecution over the objection of the prosecutor. On the contrary, Chief Justice Marshall early approved the already established "usage of this country" that the prosecutor and courts would "pass over, unnoticed" grand jury accusations on which the prosecutor "does not think it proper to institute proceedings" *United States* v. *Hill*, 26 Fed. Cas. No. 15,364, pp. 315-316, (C.C. Va.). And while this Court has never specifically ruled on the point, Chief Justice Marshall's ruling has been quoted and cited with approval. *Hale* v. *Henkel*, 201 U.S. 43, 60. Accord: *Confiscation Cases*, 7 Wall 454, 457. As the Court has noted, the grand jury can perform its accusatory function fully, in cases of disagreement between it and the

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ed charges is hardly advanced by a rule that permits the Grand Jury on its own to initiate the prosecution when the conscientious District Attorney knows to a legal certainty that a federal crime cannot be established."

prosecutor, by making a public accusation of the asserted crime in open court. *Hale* v. *Henkel*, 201 U.S. at 62.

4. Petitioner's contention that the decision of the the court below is in conflict with the decisions of this Court and of other courts of appeals (Pet. 12-14) is unfounded.[15] Plainly inapposite are the cases holding that an improper signature by a government attorney on an indictment is not a ground for reversing a conviction based thereon.[16] In each instance the defective signature had been cured by the adoption of the indictment as a basis for prosecution by the United States Attorney. None of those cases remotely involves the situation at bar, the prosecutor's refusal to accept a grand jury accusation as a pleading of the United States.[17]

Petitioner also contends that the decision below is in conflict with language of the decisions of this Court recognizing a grand jury's authority "to return an

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[15] The asserted conflict between the decision below and *Crowley* v. *United States*, 194 U.S. 461, is discussed *supra*, fn. 12.

[16] *In re Lane*, 135 U.S. 443, 449; *United States* v. *Keig*, 334 F. 2d 323 (C.A. 7); *Abramson* v. *United States*, 326 F. 2d 565, 567 (C.A. 5); *Wiltsey* v. *United States*, 222 F. 2d 600 (C.A. 4); *Wheatley* v. *United States*, 159 F. 2d 599, 600-601 (C.A. 4); *King* v. *United States*, 279 Fed. 103 (C.A. 5).

[17] Indeed, the holding of most of those cases is simply that the defendant's failure to raise the asserted impropriety in the signature on the indictment by a pre-trial motion (when the defect could have been corrected) precluded the defendant from attacking a conviction based upon the indictment.

indictment if it finds a reasonable probability that a crime has been committed" (Pet. 8-9, 14; *Sullivan* v. *United States*, 348 U.S. 170, 173). But the court below did not question the right of a grand jury to make a public accusation on its own initiative without the concurrence of the prosecutor; nor do we. And none of the decisions of this Court cited by petitioner concern the issues presented by this case—whether such an accusation becomes a pleading of the United States which institutes a criminal prosecution, and whether the government attorney is required to endorse for the United States an accusation which, after investigation, he deems ill-founded.[18]

In conclusion, we think it appropriate to emphasize the narrowness of the issue which divides the majority and the dissenting judges below. The dissenters, like the majority, expressly recognize the Attorney General's discretionary authority to "refuse to go forward" with the prosecution once the indictment is returned, and the absence of judicial power to compel him to proceed with the prosecution (Pet. App. A21-A22; *United States* v. *Greater Blouse, Skirt & Neckware Contracter Ass'n*, 228 F.Supp. 483, 489-490 (S.D.N.Y.)). The petitioner apparently agrees

[18] The court of appeals below ruled only that the order of the district court should be reversed because the United States Attorney was not required to sign the proposed indictment. In the event that certiorari is granted, however, we reserve the right to support the judgment of the court of appeals for the additional reason that he was not required to prepare the proposed indictments.

(Pet. 10-11).[19] Accordingly, the only practical effect of the asserted authority of the grand jury to institute a criminal proceeding over the objections of the Attorney General would be to put the putative defendants through the inconvenience, expense, and anxiety of being forced to answer to an accusation on which they would never be prosecuted. Such a procedure would impose upon the putative defendant the hardship of raising bond or facing incarceration until the indictment is dismissed. The Federal Rules of Criminal Procedure were specifically designed to avoid this kind of "unnecessary hardship to some defendants." Advisory Committee Notes to Rule 48, 18 U.S.C. App., p. 3438. The public interest does not call for such futile vindication.[20]

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[19] In the court of appeals, petitioner contended that, by virtue of Rule 48(a), the prosecuting attorney no longer had exclusive control over prosecutions, and that the courts "have some brakes or control" over the right of the government" to institute, maintain or abandon prosecutions." Reply Brief of Respondent and Appellee, C.A. 5, Nos. 22,018 and 22,019, pp. 14-15; Main Brief, pp. 25-26. Petitioner now agrees with the majority and the dissenters that Rule 48(a) was intended for the benefit of defendants, and "not to confer prosecution functions upon the court." Pet. 10-11.

[20] The contention of the dissenters below that the grand jury's authority to institute criminal proceedings is necessary to bring its accusations out of "the shadows of secrecy" (Pet. App. A-24-A-25) is not well taken. For the grand jury has the right, and probably the duty to make a public accusation of crime in open court in cases where the prosecutor declines to accept its indictment as a pleading of the United States. See *Hale* v. *Henkel*, 201 U.S. 43, 62. And the prosecutor is as likely to make public his reasons for declining to prosecute at that time, as he is under the procedure advocated by the dissenters.

In the more than 175 years since the adoption of the Constitution, the district court here is apparently the first which has sought to direct the Attorney General or his subordinates to perform such a prosecutorial function. The order of the district court, corrected by the court of appeals, may therefore be viewed as a unique departure from settled law raising no question of general importance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

JOHN W. DOUGLAS,
Assistant Attorney General.

MORTON HOLLANDER,
DAVID L. ROSE,
Attorneys.

MAY, 1965

APPENDIX

1. The Constitution of the United States provides in pertinent part:

ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *

* * * *

SECTION 3. * * * he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

* * * *

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; * * *

2. Title 5, United States Code, provides in pertinent part:

§ 291. Establishment of Department.

There shall be at the seat of government an executive department to be known as the Department of Justice, and an Attorney General, who shall be the head thereof.

§ 309. Conduct and argument of cases by Attorney General and Solicitor General.

Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits

in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so.

§ 310. Conduct of legal proceedings.

The Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceedings is brought.

3. Title 18, United States Code, provides in pertinent pa t:

§ 3771. Procedure to and including verdict.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and inincluding verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the district of the Canal Zone and the

Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

4. Title 28, United States Code, provides in pertinent part:

§ 501. Appointment of United States attorneys.

The President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district.

§ 503. Appointment of attorneys.

The Attorney General may appoint attorneys to assist United States attorneys when the public interest so requires.

§ 504. Tenure and oath of office; revomal.

(a) The United States attorney for each judicial district shall be appointed for a term of four years * * *. Upon the expiration of his term a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies.

(b) Each United States attorney shall be subject to removal by the President. Each assistant United States attorney and each attorney appointed under section 503 of this title shall be subject to removal by the Attorney General.

(c) Each of such officials, before taking office, shall take an oath to execute faithfully his duties.

§ 507. Duties; supervision by Attorney General.

(a) Except as otherwise provided by law, it shall be the duty of each United States attorney, within his district, to:

(1) Prosecute for all offenses against the United States;

(2) Prosecute or defend, for the government, all civil actions, suits or proceedings in which the United States is concerned;

(3) Appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury;

(4) Institute and prosecute proceedings for the collection of fines, penalties and forfeitures incurred for violation of any revenue law unless satisfied upon investigation that justice does not require such proceedings;

(5) Make such reports as the Attorney General shall direct.

(b) The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys, assistant United States attorneys, and attorneys appointed under section 503 of this title, in the discharge of their respective duties.

§ 508. Salaries.

The Attorney General shall fix the annual salaries of United States attorneys, assistant United States attorneys, and attorneys appointed under section 503 of this title within the following limitations:

* * * *

5. Executive Order No. 6166, promulgated on June 10, 1933, provides in pertinent part (5 U.S.C. (1958 ed.), pp. 139, 141):

§ 5. CLAIMS BY OR AGAINST THE UNITED STATES

The functions of prosecuting in the courts of the United States claims and demands by, and offenses against, the Government of the United States and of defending claims and demands against the Government, and of supervising the work of United States attorneys, marshals, and clerks in connection therewith, now exercised by any agency or officer, are transferred to the Department of Justice.

As to any case referred to the Department of Justice for prosecution or defense in the courts, the function of decision whether and in what manner to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense, now exercised by any agency or officer is transferred to the Department of Justice.

* * * *

6. Reorganization Plan No. 2 of 1950, 15 F.R. 3173, 64 Stat. 1261, provides in pertinent part (5 U.S.C. (1958 ed), p. 185):

§ 1. TRANSFER OF FUNCTIONS TO THE ATTORNEY GENERAL

(a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Attorney General all functions of all other officers of the Department of Justice and all functions of all agencies and employees of such Department.

(b) This section shall not apply to the functions vested by the Administrative Procedure Act (60 Stat. 237) [section 1001 et seq. of this title] in hearing examiners employed by the Department of Justice, nor to the functions of the Federal Prison Industries, Inc., of the Board of Directors and officers of the Federal Prison Industries, Inc., or of the Board of Parole.

§ 2. PERFORMANCE OF FUNCTIONS OF THE ATTORNEY GENERAL

The Attorney General may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Justice of any function of the Attorney General, including any function transferred to the Attorney General by the provisions of this reorganization plan.

7. The Federal Rules of Criminal Procedure provide in pertinent part:

RULE 1. SCOPE

These rules govern the procedure in the courts of the United States and before United States commissioners in all criminal proceedings, with the exceptions stated in Rule 54.

RULE 2. PURPOSE AND CONSTRUCTION

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

RULE 6. THE GRAND JURY

(a) Summoning Grand Juries.

The court shall order one or more grand juries to be summoned at such times as the public interest requires. The grand jury shall consist of not less than 16 nor more than 23 members. The court shall direct that a sufficient number of legally qualified persons be summoned to meet this requirement.

* * * *

(c) Foreman and Deputy Foreman.

The court shall appoint one of the jurors to be foreman and another to be deputy foreman. The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreman, the deputy foreman shall act as foreman.

(d) Who May be Present.

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is

in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

* * * *

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information.

An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of Indictment.

An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents.

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in

a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

* * * *

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) Issuance.

Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in the information, if it is supported by oath, or in the indictment. * * *

* * * *

RULE 10. ARRAIGNMENT

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

* * * *

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL: DEFENSES AND OBJECTIONS

(a) Pleadings and Motions.

Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

* * * *

RULE 48. DISMISSAL

(a) By Attorney for Government.

The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

(b) By Court.

If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.

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